IN THE

SUPREME COURT OF THE UNITED STATES

Office Supreme Court, U.S.
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JUL 13 1981
ALEXANDER L. STEVAS, CLERK

NUMBER 81-5044

RONALD S. MONROE,
Petitioner

vs.

STATE OF LOUISIANA,
Respondent

* * * * * * * * * *

PETITION FOR A WRIT OF CERTIORARI
TO THE
SUPREME COURT OF THE
STATE OF LOUISIANA

* * * * * * * * * *

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RELEVANT CONSTITUTIONAL & STATUTORY PROVISIONS

1. This case involves the Sixth , Eighth and Fourteenth Amendments to the Constitution of the United States of America.

2. This case involves the following provisons of the Louisiana Code of Criminal Procedure, C.Cr.P. Art.s 905 et seq. and the LSA-R.S. 14:30. (Appendix C)

PETITION FOR A WRIT OF CERTIORARI

TO THE

SUPREME COURT OF THE STATE OF

LOUISIANA

RONALD S. MONROE respectfully petitions the Supreme Court of the United States for a Writ of Certiorari to review the opinion and judgement of the Louisiana Supreme Court rendered and entered in case number 80-KA-2137 of that Court on April 6, 1981, rehearing denied May 18, 1981 affirming the judgement of the Criminal District Court, Parish of Orleans, State of Louisiana in case number 261-647 on the docket of Section "F" of that Court.

* * * * * * *

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner, RONALD S. MONROE, who is now held in the Orleans Parish Prison and in the custody of the Louisiana Department of Corrections, asks leave to file the attached petition for a writ of certiorari to the United States Supreme Court without prepayment of costs and to proceed in forma pauperis.

Petitioner has previously been adjudicated indigent by the State District Court and the Orleans Indigent Defender Program has been appointed to represent him. The petitioner's affidavit in support of this petition is attached hereto.

BY: _____

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IN THE

SUPREME COURT OF THE UNITED STATES

NUMBER

RONALD S. MONROE,
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vs.

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Respondent

AFFIDAVIT IN SUPPORT OF PETITION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, RONALD S. MONROE, being first duly sworn according to law, depose and say that I am the petitioner in the above-entitled cause, and, in support of my application for leave to proceed without being required to prepay costs or fees, state:

1. Because of my poverty I am unable to pay the cost of said cause.

2. I am unable to give security for the same.

3. I believe that I am entitled to the redress I seek in said cause.

4. The nature of said cause is briefly stated as follows:

I was convicted of First Degree Murder and sentenced to death in the Criminal District Court for the Parish of Orleans, Section "F", docket number 261-647, New Orleans, Louisiana. The present proceeding was commenced on an appeal to reverse the conviction and set aside the sentence on the ground that it was based upon a verdict of guilty and sentence handed down by a jury and procedure in violation of the United States Consitution.

_____
RONALD S. MONROE, Petitioner

SWORN TO AND SUBSCRIBED
BEFORE ME, NOTARY, THIS
____DAY OF _____ 1981.

_____
NOTARY PUBLIC

IN THE

SUPREME COURT OF THE UNITED STATES

NO. _____

RONALD S. MONROE,
Petitioner

vs.

STATE OF LOUISIANA,
Respondent

Petition For A Writ Of Certiorari To The

Louisiana Supreme Court

The petitioner, Roald S. Monroe, respectfully prays that a Writ of Certiorari issue to review the judgement of the Supreme Court of Louisiana entered in this proceeding on April 6, 1981, rehearing denied May 18, 1981. The judgement of the Supreme Court of Louisiana is attached hereto as Appendix A.

JURISDICTION

The judgement of the Louisiana Supreme Court rendered on April 6, 1981, became final when it denied Petitioner's Application For Rehearing on May 18, 1981. On May 20, 1081 the Criminal District Court for the Parish of Orleans, Section "F", signed a death warrant which set petitioner's execution date on August 19, 1981. On June 5, 1981 Chief Justice John Dixon granted petitioner a stay order of his execution "until such time as the United States Supreme Court takes final action his petition or until such other time in advance of that date, as this Court deems proper." (Appendix B). The jurisdiction of this Court to review by writ of certiorari is invoked under 28 U.S.C. 1257(3).

STATEMENT OF THE CASE

Ronald Monroe was arrested inside his residence at 1675 Religious Street, New Orleans, Louisiana, in the early morning hours of September 10, 1977 by New Orleans police officers and charged with the murder of his next door neighbor, Lenora Collins. The Orleans Parish Grand Jury filed an indictment charging the

petitioner Monroe with one count of first degree murder under the new first degree murder statute, LSA-R.S. 14:30, which became effective 1976, Act No.657 and which provided for a bifurcated sentence hearing to determine penalty.(Appendix C).

Mrs. Collins occupied one half of a shotgun double house at 1677 Religious Street, New Orleans, Louisiana, and defendant's family occupied the other half. Mrs. Collins was killed by an intruder in her residence at approximately 3:00 a.m. on September 10,1977. The victim and her children, Joseph, aged twelve, and Theodise, aged eleven, were sleeping in the victim's bed. The victim awoke when she heard someone enter through the the bedroom window. She began struggling with the intruder and cried for Joseph to get help. Joseph ran to petitioner's side of the house for help and saw petitioner's mother. He allegedly heard someone he later identified as petitioner Monroe speaking from inside the Monroe side of the house. Theodise tried to find something to hit the intruder, but fell down. The intruder stabbed her in the back, telling her he would kill her. Theodise managed to lock herself in the bathroom where she remained until her mother called out for help. Upon reentering the bedroom, Theodise saw her mother reach for the phone then fall to the floor. Mrs. Collins had been stabbed seven times, and three of the wounds were the cause of her death.

Monroe unsucessfully offered an alibi defense by calling his little brother, Michael Monroe, his mother, Delores Monroe, and an acquaintance, Willie Mallard for testimony.[1/] According to the defense, Monroe was drunk and sleeping in his bed at the time of the murder. Petitioner's mother testified that he was out drinking at a local bar, came home drunk before 3:00 a.m. and went to sleep. This was partially coroborated by defense witness Willie Mallard who testified he saw Monroe earlier that night walking in the direction of the bar.

1/ The Court should note that trial was held on January 24-26 in 1978 in Section "F" of the Criminal District Court for the Parish of Orleans and defendant was found guilty as charged of first degree murder and sentenced to death in conformity with Louisiana's Capital Murder sentencing procedure, C.Cr.P. Art. 905 et seq. (Appendix D). This conviction and sentence was reversed by the Supreme Court of Louisiana. La. S.Ct.62,459

On January 22-23, 1980, trial was again held in Section "F" of the Criminal District Court for the Parish of Orleans and petitioner was convicted of first degree murder and sentenced to death.(See Appendix A). On appeal, the conviction and sentence were affirmed, which provides the basis for this application for a writ of certiorari.

QUESTIONS PRESENTED

I.

WHETHER PETITIONER WAS DEPRIVED OF DUE PROCESS OF LAW UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS WHEN HIS DEATH SENTENCE WAS AFFIRMED ON THE BASIS OF AN AGGRAVATING CIRCUMSTANCE NOT WARRANTED BY THE STATE'S EVIDENCE.

The jury at petitioner's trial found three statutory aggravating circumstances to have existed: (1) the offender knowingly created a risk of death or great bodily harm to more than one person; (2) the offense was committed during an aggravated burglary; and (3) the offense was committed in an especially heinous, cruel, or atrocious manner. After reviewing the propriety of the first and second aggravating circumstances, the Supreme Court of Louisiana concluded that further appellate review was unnecessary since the jury had the authority under C.Cr.P. Art. 905.3 of the Louisiana Code of Criminal Procedure to impose a death sentence after it found at least one statutory aggravating circumstance. (Appendix A at p. 23). The Louisiana Supreme Court found that there was no evidence that the offense was <u>especially</u> heinous, cruel, or atrocious because there was no "torture or the pitiless infliction of unnecessary pain on the victim." (Appendix A, p. 23). Petitioner argues that in view of the procedure under C.Cr.P. Art. 905.3 the death sentence cannot be affirmed because there is nothing in the Louisiana capital sentencing law that requires a jury to return a death verdict under such circumstances and there is no way to access how the jury weighed the aggravating circumstance (with the other aggravating circumstances found) which was not warranted by the evidence. Some jurors might have returned their recommendation because of the presence of the third aggravating circumstance combined with the other two.

II.

WHETHER PETITIONER WAS DEPRIVED OF HIS RIGHT TO A FAIR TRIAL WHEN THE TRIAL JUDGE REFUSED TO DECLARE A HUNG JURY MISTRIAL IN THE SENTENCING HEARING WHEN THE JURY WAS DEADLOCKED ON THE ISSUE OF SENTENCE.

During the Sentence Hearing, the jury reported to the Court that the jury was deadlocked on the issue of sentence. The trial judge refused to declare a mistrial and ordered the jury to further deliberate on the issue of sentence. C.Cr.P. Art. 905.8 states:

> "The court shall sentence the defendant in accordance with the recommendation of the jury. If the jury is unable to unanimously agree on a recommendation, the court shall impose a sentence of life imprisonment without benefit of probation, parole or suspension of sentence."

Petitioner alleges the refusal of the trial judge to order a mistrial when the jury was deadlocked on the sentence recommendation amounted to ordering the jury to return a death penalty because by law the court must impose a life sentence if the jury cannot agree on a sentence recommendation. Petitioner notes that in the bifurcated hearing procedure under the Louisiana Capital Murder sentencing provisions of C.Cr.P. 905 et seq. the only time the jury can recommend sentence is in a death penalty case. That recommendation is within the sole province of the jury and the trial judge is without constitutional authority to order a deadlocked jury to deliberate further on the issue of life or death when the jury's deadlockd means automatically that the court must impose a life sentence. The trial judge's refusal to accept the deadlock amounted to "marching orders" to the jury to return a death verdict. The jury was instructed by the court on issues of law and then upon deliberating further, returned a recommendation for a death penalty. Petitioner was deprived of due process of law by the actions of the trial judge in refusing to declare a mistrial due to the deadlocked jury.

REASONS FOR GRANTING THE WRIT

I.

THE PETITIONER WAS DEPRIVED OF DUE PROCESS OF LAW WHEN HIS DEATH SENTENCE WAS AFFIRMED ON THE BASIS OF AN AGGRAVATING CIRCUMSTANCE NOT WARRANTED BY THE STATE'S EVIDENCE.

In returning a recommendation that the death sentence be imposed, the jury found three statutory aggravating circumstances:

1. C.Cr.P. Art. 905.4(a) - the murder occurred while the defendant was engaged in the perpetration of an aggravated burglary, LSA-R.S. 14:60.

2. C.Cr.P. Art. 905.4(d) - the defendant knowingly created a risk of death or great bodily harm to more than one person.

3. C.Cr.P. Art. 905.4(g) - the offense was committed in an especially heinous, atrocious or cruel manner.

The Supreme Court of Louisiana reviewed these aggravating circumstances and concluded that the jury properly found two of these circumstances to be warranted by the evidence. (C.Cr.P. Arts. 905.4(a) and (d)). However, the court also found that C.Cr.P. Art. 905.4(g), the offense was committed in an especially heinous, atrocious or cruel manner, was not warranted by the evidence. See (Appendix A, p. 22-23).

In Gregg v. Georgia, 428 U.S. 153, 189 (1976) the Supreme Court of the United States stated that Furman v. Georgia, 408 U.S. 238 (1972) "mandates that where descretion is afforded a sentencing body in a matter so grave as the determination of whether a human life should be taken or spared, that descretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." The Louisiana Supreme Court has misinterpreted the pronouncement of Furman in its majority opinion. (See dissent by Justice Dennis in Appendix A). Neither the trial court's instructions nor any provisions of the Louisiana Sentencing Statute, C.Cr.P. Arts. 905 et seq. require the jury's sentence recommendation of death to be based on any single aggravating

factor found by the jurors. The jury is required to return a general verdict recommendation, listing the aggravating circumstances found to exist. In the court's general charge, the instructions to the jury advised the jurors that they were merely authorized, but not required to return a death sentence recommendation, even if they found one or more aggravating circumstances beyond a reasonable doubt.

Given this instruction, there is no reliable way to determine from the jury's general verdict which aggravating circumstances might have tipped the scales towards a death verdict. Since there is no requirement for written reasons for the recommendation of a death penalty and the jury instructions did not expressly call for jury unanimity on the particular circumstance(s) which would warrant a sentence of death, it is possible that some members of the jury might well have voted for a death sentence solely on the basis of any one aggravating circumstance. Any combination of jurors might well have considered as determinative of a death sentence recommendation an aggravating circumstance not supported by the evidence (C.Cr.P. Art. 905.4(g)). Consequently, while there is a liklihood that the aggravating circumstance (C.Cr.P. Art. 905.4(g) - the offense was committed in an especially heinous, atrocious, or cruel manner) played some role in the jury's ultimate decision to impose the death penalty, that finding will remain wholly insulated from any appellate review under the majority opinion of the Louisiana Supreme Court. Absent such review, there is no assurance that the jury's descretion has been "suitably directed and limited". Gregg v. Georgia, supra, 428 U.S. at 189. As a result, there is no appellate check against the random or arbitrary imposition of the death penalty by a sentencing jury, and the concerns that prompted this Court's decision in Furman have not been met.

There are several other fatal flaws in the approach to appellate review adopted by the Louisiana Supreme Court. First, this principle of appellate review fails to heed the call "for a greater degree of reliability when the death sentence is imposed." Lockett v. Ohio, 438 U.S. 586, 604 (1978). Instead, an articulated aspect in the jury's verdict to recommend a death sentence is not even cursorily reviewed by the appellate court (that aspect being how the aggravating circumstances were weighed by the various members of the jury and which one(s) played the major or decisive role in the decision to recommend death). This is hardly consistent with this Court's view that "when a defendant's life is at stake, the Court has been particularly sensitive to ensure that every safeguard is observed." Gregg v. Georgia, 428 U.S. at 187. See also Gardner v. Florida, 430 U.S. 349, 357 (1977).

Second, the standard adopted by the Supreme Court of Louisiana effectively establishes a conslusive presumption that if a jury has found one valid aggravating circumstance, death must be imposed, despite the fact that the jury, had it not considered the unwarranted circumstance might itself have chosen not to impose a death sentence. As Woodson v. North Carolina, 428 U.S. 280 (1976) and Roberts v. Louisiana, 428 U.S. 325 (1976) establish, a mandatory death sentence which "fail(s) to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death," Woodson v. North Carolina, supra, 428 U.S. at 303, is unconstitutional. The Louisiana Supreme Court's affirmance of petitioner's sentence because of the presence of some valid (and unvalid) aggravating circumstances deprived the petitioner of appellate consideration of all those aggravating and mitigating factors which were before the jury, replacing its delicate balancing of factors with an inflexable per se rule.

Third, the state supreme court's review process does not provide sufficient protection from a death verdict based on an unconsittuitonal or unwarranted aggravating circumstance. For example, as here where a finding by the jury that the crime was committed in an especially heinous, atrocious or cruel manner should fail to pass constitutional muster because "upon the record evidence adduced at the trial no rational finder of fact could have found proof beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 2792, 61 L.Ed.2d 560 (1979). This was precisely the conclusion of the state supreme court in the case at bar, for it perceived "no rational basis for a finding of proof beyond a reasonable doubt that (the petitioner) intended to commit a conscienceless or pitiless crime which was unnecessarily tortuous to the victim". (Appendix A). However, in concluding its majority opinion, the Louisiana Supreme Court failed to recognize that a verdict of death based upon evidence insufficient for a finding of fact beyond a reasonable doubt is just as unconstitutional as one based upon a facially unconstitutional statute. Jackson v. Virginia, supra.

Moreover, assuming that the third aggravating circumstance (here C.Cr.P. Art. 905.4(g)) is constitutionally invalid or unwarranted by the evidence, the reviewing court should set aside the general death verdict, since there is no way of determining whether the jury relied upon this circumstance or to what extent in reaching its decision. Stromberg v. California, 283 U.S. 359 (1931); Williams v. North Carolina, 323 U.S. 516 (1945). Yet the Supreme Court of Louisiana concluded that the entire death verdict was valid merely because one aggravating circumstance was appropriate. This is a shortcut to certainty when "in death cases all doubts should be resolved in favor of the accused." Anders v. United States, 333 U.S. 740 (1978).

In sum, under the test adopted by the Supreme Court of Louisiana, this settled principle of law would afford no relief to the petitioner, since that court considers its review process at an end when a single aggravating circumstance is found to be valid. It is shocking to consider that a potential constitutional flaw in a jury's death verdict can and will be wholly neglected during the appellate review process of the Supreme Court of Louisiana so long as one valid aggravating circumstance exists. This limited scope of review "is unacceptable and incompatible with the commands in the Eighth and Fourteenth Amendments." Lockett v. Ohio, 439 U.S. at 605. Maintaining death sentences under conditions such as these would create a further problem as regards future review of Louisiana death cases. One of the major aims of the cases decided with Gregg v. Georgia, 428 U.S. 153 (1976), is to demand that if the death penalty is imposed, it should be imposed under conditions which "make rationally reviewable the process for imposing a sentence of death." Woodson v. North Carolina, 428 U.S. 280 (1976), Furman v. Georgia, supra. Allowing the sentence to stand absent one of the jury's determinations creates a fallacious assumption, in the Louisiana jurisprudence, that the aggravating circumstances remaining were the reasons for the death sentence. Since death penalty cases are relatively rare, each case plays a major role in State Supreme Court review for excessiveness and proportionality. See La. C.Cr.P. Art. 905.1. Using an inaccurate assessment of the jury's determination would only serve to further confuse the already problematic system of judicial review, thus running directly contrary to the mandates of Furman and Woodson.

The dissent by Justice Dennis of the Supreme Court of Louisiana states the correct application of appellate review pursuant to C.Cr.P. Art. 905.4(g) when found unwarranted by the evidence:

> "Moreover, I do not see how it rationally may be contended that a jury which erroneously

> believes it has legally found three aggravating circumstances to exist will not be more apt to recommend that the defendant be sentenced to death than a jury which correctly believes that the defendant is guilty of a crome involving two aggravating circumstances. To think otherwise is to ignore the realities of a capital sentence hearing."

Justice Dennis states that Stephens v. Zant, 631 F.2d 397 (5th Circuit 1980) is a correct application of the constitutional principle. In Stephens v. Zant, supra, a Georgia case, the Fifth Circuit dealt with a situation almost identical to the one present here. In Stephens, the jury returned a death sentence based on three aggravating circumstances:

1) the defendant was an escapee from lawful custody. Ga. Code Ann. Sec. 27-2534.1(b)(9)
2) the defendant had a prior conviction for a capital felony. id.(b)(1)
3) the defendant had a substantial history of serious, assaultive criminal convictions. id.

After the defendant's sentence and before review by the Georgia Supreme Court, that Court held aggravating circumstance (3) to be unconstitutionally vague. Arnold v. State, 236 Ga. 534, 224 S.E. 2d 386 (1976). The Georgia Court then held, as the Louisiana Supreme Court did here that the absence of the third aggravating circumstance did not impair the sentence.

The Fifth Circuit panel overturned the Georgia decision, reasoning that since the jury had the authority not to return a death sentence even if it found aggravating circumstances, there was no way to be sure that the jurors would have voted for death if the last, unconstitutional, circumstance was not present. They based their decision upon a line of cases starting with Stromberg, supra, in which this court ruled that a conviction must be set aside when a jury gives a general verdict in which it could have convicted on any one of several grounds, and one of those grounds is found to be unconstitutional. This is necessary because of the

possibility that the verdict was based on the unconstitutional ground. See also Bachellar v. Maryland, 397 U.S. 564 (1970); Street v. New York, 394 U.S. 576 (1969); Yates v. United States, 354 U.S. 298 (1957).

The factual situation in a Stromberg type case is different from that found here and in Stephens, but the rationale applies with equal, if not greater,force. This case involves a sentence, not a conviction. However, since a sentence of death is "unique in its total irrevocability", Furman v. Georgia, 408 U.S. at 306 (Justice Stewart concurring), more reliability is and should be demanded of it than of a conviction. Lockett v. Ohio, 438 U.S. 586 (1978). Another distinction is that the Stromberg situation involves a facially unconstitutional statute, whereas this case involves a statute unconstitutionally applied. Here, the Louisiana Supreme Court found that there could not be a rational finding of heinousness as it is interpreted by that court. In Stromberg, and its followers, the statutory language itself was invalid. This distinction is moot because a finding based on an unconstitutional application of a statute is no less unconstitutional than one based on a statute void on its face.

The Fifth Curcuit ruling in Stephens is the only alternative faithful to the goals announced in Furman and Gregg. To affirm the Louisiana holding would be to maintain a sentence of supreme punishment which may have been hesitatingly imposed[1] primarily because of the unconstitutionally applied aggravating circumstance[2] or imposed because one or more of the jurors felt

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1 This was evidenced by the jury's attempt to inform the judge that their deliberations on penalty were deadlocked, whereupon the trial judge refused to declare a hung jury and ordered them to deliberate further, despite the fact that a deadlocked jury would have meant an automatic imposition of a life sentence.(See Article III in this Petition)

the final (unconstitutionally applied) circumstance tipped the scales in favor of a death sentence. As Justice Dennis pointed out in his dissent to the Louisiana Supreme Court's majority opinion, it would be to ignore the realities of capital sentence hearings to assume that a jury does not base its decisions on the aggravating and mitigating circumstances it finds. Both the defense and prosecution arguments and testimony run along the lines of whether or not these circumstances exist. When the Supreme Court of Louisiana starts striking these circumstances, the basis of the jury's verdict is erroded.[3]

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[2]Of the three aggravating circumstances, it is probable that the most prejudicial in the mind of a layman is keinousness. It is difficult to see why the defendant is more blameworthy because he broke into the house than he would be if he had waited for the victim outside. That he tried to injure more than one person, while certainly making him more blameworthy than if he had not, would probably not prejudice a juror nearly so much as the thought that the crime was committed in a heinous, atrocious or cruel manner. While this proposition is certainly not an a priori truth, basis for it can be found in the understandable revulsion that a person must feel for any murder and the often given justification of the death penalty as flowing from a natural public outrage (so as not to sow the seeds of vigilantism). Outrage, from a juror's standpoint, would coincide most readily with thoughts of heinousness, thus making that particular aggravating circumstance the most compelling of the three.

[3] The Louisiana Supreme Court has now come to realize the problems inherent in the after the fact review of a finding of heinousness. In State v. Sonnier, ___So.2d _____(decided June 22, 1981) the Court ruled that the jury must be given the jurisprudential meaning of C.Cr.P. Art. 905.4(g), the heinousness statute. This opinion was written by Justice Dennis, who agreed with the new constitutional safeguard as being mandated by Godfrey v. Georgia, ____U.S. ____,100 S.Ct. 1795 (1980), but also once again noted his objection to allowing the sentence to stand after the Court nullifies a finding of heinousness.

II.

WHETHER PETITIONER WAS DEPRIVED OF HIS RIGHT TO A FAIR TRIAL WHEN THE TRIAL JUDGE REFUSED TO DECLARE A HUNG JURY MISTRIAL IN THE SENTENCING HEARING WHEN THE JURY WAS DEADLOCKED ON THE ISSUE OF SENTENCE.

The question present here is whether or nor, in a state where the jury decides on the question of capital punishment, the trial judge is permitted to control the length of the jury's deliberations by making them deliberate further after they have told him they are deadlocked on the issue of sentence and cannot reach a decision. Under the Louisiana sentencing procedures, C.Cr.P. Art. 905 et seq., in a capital case a deadlocked jury means the court must automatically impose a life sentence. If this were a non-capital case, the answer would be simple. A hung jury would result in a mistrial and the State could retry the defendant on the issue of guilt or innocence. It would be up to the judge to decide just what is a reasonable time for deliberation. However, this is different in a capital case where the jury decides between life or death and important distinctions must be made.

A capital case differs in both the severity and irreversibility of the punishment involved. Gardner v. Florida, 430 U.S. 349 (1977).

> "...and thus a higher standard of reliability is required to assure that the penalty is not imposed in an arbitrary manner."

Also, the sentencing hearing is not a conviction phase of the trial. The defendant has already been convicted and a hung jury mistrial does not call for a new trial as in a non-capital case, but results in an automatic life sentence. C.Cr.P. Art. 905.

The capital sentencing procedure of Louisiana places the responsibility for imposing the death sentence solely on the jury.

The jury must return a unanimous verdict before death can be imposed.[4] When a judge has the descretion to accept or not to accept the jury's own determination that they cannot decide on a sentence, several things occur which fly in the face of the requirement of non-arbitrariness established by this Court in Furman v. Georgia, supra. First, when presented with such an option, the judge becomes an additional cause-in-fact of the death sentence. This cannot help but add to the complexity and the difficulty of review of death sentences. If the jury makes the decision on its own, there is but a single decisionmaker. If a judge has a choice as to whether or not he will exercise his descretion, the problem arises of an additional decisionmaker. This confuses both the process of decision and review in terms of arbitrariness (and there is good reason to believe that a more compassionate judge will refuse to exercise his discretion even if he feels that the jury has decided in less than a reasonable time. Such a refusal is not subject to review because the result is not capital punishment). Second, asking a jury to reconsider what is essentially a defacto recommendation for mercy is a way of injecting a judge's personal opinion into the proceedings. Even the dullest of jury members must consider why the judge has made the decision for the jury to deliberate further. Since the jury knows that the consequences of a hung jury are identical to one of the two possible recommendations which they may return, and that the judge has refused to accept the hung jury, the reasonable and likely inference is that the judge does not favor a life sentence for the defendant.

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[4] This should be distinguished from the system present in Florida where the judge is the sole sentencing authority and the jury, by majority vote, merely suggests life imprisonment or capital punishment. The issue here is not who must decide on the sentence, but whether the influence of the trial judge (without sentencing descretion) can inject arbitrariness into the sentencing process contrary to the dictates of Furman, supra, and the later death penalty cases.

The problem with permitting the injection of the court's opinion into the deliberations is that it seduces the jury into thinking that the authoritive voice of the law demands the death of the defendant. This totally destroys the ability of the jury to perform its function as the "link between contemporary values and the penal system." Witherspoon v. Illinois, 391 U.S. 510, at 519, Woodson v. North Carolina, 428 U.S. 280 (1976).

Finally, this Court, by approving the system on which the Louisiana sentencing procedure is based, Gregg v. Georgia, 428 U.S. 153 (1976) meant to control the jury's pre-Furman descretion, not to add an element of judicial descretion to the process. To affirm the Louisiana holding would be to allow such an addition. This is problematic because a judge's own personal feelings concerning both capital punishment itself and the case cannot help but play an important part in his decision to exercise his discretion. Some judges might be more apt to send the jury back to reconsider while others might be predisposed to accept the jury's own appraisal of the situation. Since life sentences customarily are not subject to the close Supreme Court scruitiny as are death penalty cases, cases in which the judge accepts the jury's determination are not avaliable to compare with cases in which he does not. Arbitrariness in the exercise of such judicial descretion would be extremely difficult to find and correct, thus the opportunity for its introduction should be forclosed and the Louisiana holding reversed.

Respectfully submitted,

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CONCLUSION

Considering the law and jurisprudence of the United States of America and the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, petitioner RONALD S. MONROE requests this petition for a writ of certiorari to review the judgement of the Louisiana Supreme Court be granted.

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of _____ 1981, in accordance with Rule 33 of the Rules of the Supreme Court of the United States, copies of the:

(1) Motion for Leave to Proceed in forma pauperis

(2) Affidavit in Support of Petition for Leave to Proceed in forma pauperis

(3) Petition for Writ of Certiorari, and

(4) Certificate of Service,

were served upon the State of Louisiana, the Office of the District Attorney for the Parish of Orleans, Louisiana by delivering the above copies to Mrs. Louise Korns, Assistant District Attorney for the Parish of Orleans, Louisiana Supreme Court Library, New Orleans, Louisiana 70112.

BY: _____

JOHN M. LAWRENCE
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EXHIBITS ATTACHED

EXHIBIT A	Copy of La. Supreme Court decision
EXHIBIT B	Stay of Execution Order
EXHIBIT C	Copy of R.S. 14:30, First Degree Murder Statute
EXHIBIT D	Louisiana Capital Sentencing Law
EXHIBIT E	Warrant of Execution

APR 6 1981

SUPREME COURT OF LOUISIANA

No. 80-KA-2137

STATE OF LOUISIANA

Versus

RONALD MONROE

Appeal from the
Criminal District Court, Section "F,"
Parish of Orleans, Louisiana.
Honorable Oliver P. Schulingkamp, Judge.

DIXON, Chief Justice

Ronald Monroe was convicted of first degree murder, R.S. 14:30, and sentenced to death in conformity with Louisiana's capital sentencing procedure. C.Cr.P. 905 et seq. There is no merit to any of the thirty-seven assignments of error. Additionally, after reviewing the sentence imposed, we find that in this case the death penalty is not an excessive sentence. The conviction and sentence are affirmed.

The murder victim was Lenora Collins, defendant's next door neighbor. Ms. Collins occupied one half of a shotgun double, and defendant's family occupied the other half. The murder occurred at approximately 3:00 a.m. on September 10, 1977. The victim and her children, Joseph, aged twelve, and Theodise, aged eleven, were sleeping in the victim's bed. The victim awoke when she heard someone enter through the bedroom window. She turned on the light, began struggling with the defendant, and cried for Joseph to get help.

Theodise tried to find something with which to hit the defendant, but she fell down. The defendant stabbed Theodise in the back, telling her he would kill her. Theodise managed to lock

herself in the bathroom where she remained until her mother called out for help. Upon reentering the bedroom, Theodise saw her mother reach for the phone then fall to the floor. Ms. Collins had been stabbed seven times, and three of the wounds were the cause of her death.

The evidence adduced at trial consisted of the testimony of the two children. Both had known the defendant for several years, and both identified him as their mother's assailant. The state presented evidence that the defendant's motive for the murder was anger over being evicted because Ms. Collins' mother had recently purchased the residence. Monroe unsuccessfully offered an alibi defense, according to which he was drunk and sleeping in his bed at the time of the murder.

Assignment of Error No. 1

By this assignment defendant contends that the trial judge erred in overruling his motion to quash the petit jury venire for January, 1980. He claims he was prejudiced by a newspaper account of a surge of homicides in New Orleans during January, 1980. He contends that the "prospective jurors have read these news items and are exposed to such publicity concerning crime in New Orleans that the defendant cannot get a fair trial." Even assuming that defendant could have proved his allegations, which he made no attempt to do, the judge's action was proper. A petit jury venire can be set aside only for fraud. C.Cr.P. 419. Prejudicial publicity can provide grounds for a change of venue, C.Cr.P. 622, but does not entitle a defendant to set aside an entire petit jury venire.

Defendant also alleges that the January, 1980 venire was tainted because of conversations between jurors and assistant district attorneys which left the jurors with "the impression that other defendants who either do not take the stand or do not inform the jury of any allegations of crime attributed to them are not being truthful to the jury." The trial judge properly denied

defendant's motion since no proof was offered by the defendant to substantiate this allegation. See State v. Sheppard, 350 So.2d 615 (La. 1977).

This assignment of error lacks merit.

Assignments of Error Nos. 2 and 8

By Assignment No. 2 defendant contends that C.Cr.P. 798(2) is unconstitutional because it deprived him of his right to a trial by a jury selected from a fair cross section of the community. This court rejected this argument in State v. Kelly, 375 So.2d 1344, 1348 (La. 1979), and has repeatedly permitted the exclusion of jurors properly challenged under C.Cr.P. 798(2) for conscientious scruples against capital punishment. See State v. Martin, 376 So.2d 300, 306 (La. 1979).

By Assignment No. 8 defendant contends that jurors challenged for cause under C.Cr.P. 798(2) were not held to the requirements of Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). The record shows that the jurors were held to the Witherspoon standard.

These assignments lack merit.

Assignments of Error Nos. 3 and 19

These assignments concern the admissibility of items seized during defendant's arrest. He argues that, because the officers arrested him from his mother's home without first obtaining a warrant, their entry into the home was unlawful under Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980), and State v. Brown, 387 So.2d 567 (La. 1980).[1] Defendant's reliance upon these cases is misplaced. Payton v. New York, supra, does not proscribe every warrantless entry into private premises to effect arrests.

In the instant case, the officers first learned of the murder at 3:22 a.m. They soon arrived at the scene, and were told by the children of the victim that the defendant, who lived next door,

was the assailant. The officers knocked at the door of defendant's home at 4:00 a.m. and asked his mother if defendant was there. After entering the home, they arrested defendant from his bedroom. They noticed that defendant's bedspread had fresh blood stains on it so they seized it. Additionally, they seized a bloody dish towel from the kitchen garbage can.

We reject defendant's argument that there were no exigent circumstances justifying the warrantless entry which occurred in this case. The officers had probable cause to believe that defendant had stabbed a woman to death only moments before, in the same building. The murder weapon had not been recovered. Unlike the situations presented in Payton v. New York, supra, and State v. Brown, supra, there was no time to obtain a warrant here. This case is closer to State v. Abadie, 390 So.2d 517, 520 (La. 1980), in which we stated:

> " . . . It has long been recognized that police acting with probable cause may effect warrantless entries to search and arrest when confronted with a situation, such as here, in which prompt action is necessary to prevent the flight of alerted suspects and possible destruction or removal of evidence. Warden v. Hayden, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967). The Payton decision only barred warrantless arrests following non-consensual entry into the suspect's house under circumstances in which there was no justification for the officers' failure first to present their facts to a neutral magistrate and to obtain judicial approval prior to the invasion of the suspect's house. Here, there was plainly no time for that procedure, since suspects were scampering away and evidence was within the immediate view of the police. The entry to arrest and to secure the safe was clearly supported by probable cause and was reasonable under the circumstances, despite the absence of prior judicial approval."

These assignments lack merit.

Assignments of Error Nos. 4 and 10

By Assignment No. 4 defendant complains of the trial judge's denial of his motion for individual voir dire and sequestration of jurors during voir dire. The burden is on the defendant to show special circumstances indicating why individual voir dire is warranted. Because defendant made no such showing, the trial judge did not abuse his discretion in denying the motion. State v. Berry, 391 So.2d 406, 411 (La. 1980) (on original hearing); State v. Dominick, 354 So.2d 1316, 1321-22 (La. 1978).

In Assignment No. 10 the defendant claims the trial judge erred in denying his motion for mistrial when a prospective juror stated, "I don't think [the defendant] would be here if the district attorney didn't think he did something." The defendant claims that, since the jurors heard this remark, they were influenced by it, and consequently defendant could not receive a fair trial.

The jurors who were chosen swore to accept the law as given to them by the judge. They were instructed on the presumption of innocence. Implicit in defendant's argument is the assumption that, because the jurors heard this remark, they were unable to accept the law as given to them by the judge. We do not believe this prospective juror's statement could have had such an impact. The complained of remark was a typical misconception of the law--the type that voir dire is designed to dispel.

These assignments lack merit.

Assignment of Error No. 5

Defendant argues in this assignment that the trial judge erred in denying his motion for funds to hire a pathologist and a fingerprint expert. The burden is on the defendant to show that he is unable to obtain existing evidence crucial to the defense. State v. Madison, 345 So.2d 485, 490 (La. 1977). No such showing was made in the instant case. Nor does counsel in his brief allege that defendant

was prejudiced by his inability to hire a pathologist or a fingerprint expert. Furthermore, we do not see how defendant could possibly have been prejudiced. No fingerprint evidence was introduced at trial because the fingerprints obtained from the victim's residence were too smudged. And, the defendant relied upon an alibi defense at trial. The cause of death, time of death, and extent of wounds were not contested by the defendant.

This assignment lacks merit.

Assignments of Error Nos. 6 and 25

In these assignments of error defendant contends that R.S. 14:30 and C.Cr.P. 905 to 905.9 are unconstitutional because they deprive a defendant of due process. This court has noted in State v. Williams, 383 So.2d 369, 373 (La. 1980), that our capital sentencing law is modeled after the Georgia statute upheld by the United States Supreme Court in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

These assignments lack merit.

Assignments of Error Nos. 12, 13 and 16

Assignments Nos. 12 and 13 concern the trial judge's denial of defendant's motion for mistrial during the testimony of Officer Fred Dantagna, who testified for the state. The basis for the objection was hearsay testimony by Dantagna to the effect that the victim's children had identified defendant as their mother's assailant. Assignment No. 16 concerns hearsay testimony by the victim's sister in which she related that the children had identified the defendant as the perpetrator.

We agree that the testimony constituted inadmissible hearsay and should not have been admitted. The trial judge erred. Nevertheless, both children testified at trial and identified the defendant. Thus, the hearsay remarks were merely cumulative and corroborative of the children's testimony. The children were available

for cross-examination, and the defendant's confrontation rights were not abridged. State v. McMahon, 391 So.2d 1120 (La. 1980).

These assignments are without merit.

Assignments of Error Nos. 14 and 15

Theodise Collins, the victim's daughter, related how she had hidden in the bathroom until her mother called out to her. She then observed her mother reach for the phone and fall to the floor. The prosecutor asked, "Now what was your mama's condition, Theodise when she was laying (sic) on the floor?" Defense counsel objected that the question called for information outside the witness' knowledge. The objection was overruled, and the witness replied that her mother was bloody. According to the transcript, the witness then began to cry.

Assignment No. 14 concerns the trial judge's overruling the objection to the prosecutor's question on the mother's condition. The question was apparently designed to elicit a description of the victim's physical appearance. Since the witness had observed her mother, this was a fact within the witness' knowledge. R.S. 15:463. Counsel in brief attempts to object to the relevancy of the question, but since this ground was not urged at trial, that matter is not properly before us. C.Cr.P. 841; State v. Davis, 357 So.2d 1125 (La. 1978).

By Assignment No. 15 defendant complains that photographs of the victim were shown to the witness in order to cause her to cry. The transcript indicates that the witness declared that her mother was bloody, then began to cry, then a few moments later the objection regarding the photographs was lodged. It does not appear that the showing of the photographs preceded the witness' crying. Nor does the record reveal whether the photographs in fact were shown to the witness. Nor is it clear whether the photographs in fact were merely snapshots of the victim or whether they were pictures taken on the night of the murder.

These assignments lack merit.

Assignment of Error No. 17

By this assignment defendant complains that, since motive is not an element of the crime of first degree murder, the trial judge erred in admitting certain documentary evidence that tended to prove motive for the killing.[2] The threshold for admissibility is relevance to a material issue. R.S. 15:435. Motive is relevant to explain the actions of the accused and to show the intent with which he acted. 1 J. Wigmore, Evidence § 118 (3d ed. 1940).

This assignment lacks merit.

Assignments of Error Nos. 18 and 20

By these assignments defendant contends that the trial judge committed reversible error by admitting into evidence five photographs which defendant says are gruesome. There is no merit to this argument. All five photographs are in black and white, and only one is of the victim. One photograph depicts an overturned coffee table and a telephone which had been yanked off the wall, while another shows the blood stained sheets. The remaining two are innocuous photographs of items in the bedroom. The trial judge did not abuse his discretion when he allowed these five photographs to be admitted into evidence.

These assignments lack merit.

Assignment of Error No. 21

This assignment concerns the trial judge's characterization of testimony by Delores Monroe, the defendant's mother, as inadmissible hearsay. The witness sought to relate the details of a conversation between Theodise Collins, the victim's daughter, and George Stenson, the victim's former lover. During the conversation, which allegedly occurred on the day before the murder, Stenson told Theodise that he would return to see Ms. Collins later that evening. Defendant contends that the statement's introduction was sought to

impeach the statement by Theodise that she didn't remember talking to Stenson on the day before the murder.

Even assuming that Theodise's statement was susceptible of impeachment and that a proper foundation for impeachment was laid, the testimony was properly excluded. If counsel's purpose was to impeach Theodise's credibility by showing that her memory was fallible, then the impeachment occurred when Mrs. Monroe testified that she saw Stenson talking to Theodise on the day of the murder. Further testimony by Mrs. Monroe on the conversation would be impeachment as to a collateral fact. R.S. 15:494.

This assignment lacks merit.

Assignment of Error No. 22

By this assignment defendant contests the trial judge's ruling that state rebuttal witness Willie Miller could testify that Delores Monroe had asked him to lie at trial about defendant's whereabouts on the night of the murder. Despite defense counsel's claim that the testimony constituted inadmissible hearsay, the trial judge ruled that the testimony was admissible to impeach Mrs. Monroe's credibility.

R.S. 15:492 authorizes the impeachment of a witness by showing his bias, interest, or corruption in relation to the instant prosecution. Since Mrs. Monroe on cross-examination denied that she had asked Miller to testify on the defendant's behalf, a proper foundation was laid for the introduction of extrinsic evidence to show her bias, interest, or corruption. State v. Elzie, 351 So.2d 1174, 1177 (La. 1977).

This assignment lacks merit.

Assignment of Error No. 23

This assignment concerns two remarks by the prosecutor during rebuttal argument. The defendant contends that the trial judge should have declared a mistrial because the remarks were prejudicial. The first remark was a statement concerning the

children's credibility. The prosecutor said, "No interest to lie whatsoever. Now you saw Theodise crying on that stand at the end." This is permissible argument. Demeanor and motive are factors affecting credibility, and argument on credibility is permitted under C.Cr.P. 774. See State v. Sayles, ____ So.2d ____ (La. 1981) (No. 80-KA-1577).

The second remark was the statement that "there is one other witness who would testify that [the defendant] was there that night, and that would be Lenora Collins." That the victim of a murder cannot testify at trial is tautological. Whether the victim would have identified the defendant as her assailant is the primary issue for the jury to decide. This was improper argument. Nonetheless, before this court will overturn a conviction because of improper argument, there must be convincing proof that the jury was influenced by the remarks and that the remarks contributed to the verdict. State v. Carthan, 377 So.2d 308 (La. 1979).

The state's case against the defendant consisted of the eyewitness identifications by the victim's two children, both of whom were present when the assailant broke into their mother's bedroom. The defense consisted of alibi testimony to the effect that the defendant had been out drinking on the evening of the murder but was "sleeping it off" at the the time Ms. Collins was killed. The jury's decision to accept the children's testimony and thereby reject the alibi defense could not possibly have been attributable to the complained of remark by the prosecutor during rebuttal argument.

This assignment lacks merit.

Assignment of Error No. 24

By this assignment of error defendant contends that the trial judge committed reversible error when he rejected eleven of defendant's requested special charges. The applicable law is contained in C.Cr.P. 807, which provides in part:

> "A requested special charge shall be given by the court if it does not require qualification, limitation, or explanation, and if it is wholly correct and pertinent. It need not be given if it is included in the general charge or in another special charge to be given."

Defense counsel in brief argues that, although requested charges numbered one through four were included in the court's general charge, the trial judge erred in deleting portions of defendant's requested charge. This contention lacks merit. The only substantial omission concerns requested Charge No. 4 on identification. The trial judge deleted the portion dealing with accuracy of identification. The omitted material was not a statement of law but rather an unsubstantiated opinion on the hazards of mistaken identity.

Special Charge No. 6 on intoxication was correctly rejected because it is an erroneous statement of law. The trial judge properly charged the jury on R.S. 14:15, which details the limited instances in which intoxication is a valid defense.

Requested Special Charge No. 8 contained a definition of reasonable doubt. Defendant contends that, although the judge charged the jury on the definition of this term, the defendant's proffered definition was better. We do not agree. The judge's charge explained in detail how the jury is not restricted to the evidence in finding a reasonable doubt. Defendant's definition omitted this explanation, and used as examples the two grounds upon which defendant hoped to instill a reasonable doubt. It would have been improper for the judge to have used the facts of this case as his definition in the general charge. C.Cr.P. 806.

By requested Charge No. 10 defendant objected to the trial judge's characterization of reasonable doubt as involving "serious doubt" and "grave uncertainty." These phrases, when viewed in the context of the trial judge's entire charge on reasonable

doubt, constitute an accurate statement of the law.

Requested Special Charge No. 12 was designed to assist the jury in applying the concept of reasonable doubt to a decision where such lesser included verdicts are not responsive. The judge properly excluded this charge since the possibility of such a situation did not occur until 1978, after this offense was committed.[3]

Requested Special Charge Nos. 13-15 involve the proof of specific intent. The trial judge properly charged the jury that specific intent can be inferred from the circumstances of the transaction. R.S. 15:445; State v. George, 346 So.2d 694, 707 (La. 1977). Defendant's proffered charge was inaccurate in that it would have disallowed the inference unless there existed external signs of specific intent apart from the mere fact of killing.

This assignment of error lacks merit.

Assignment of Error No. 28

By this assignment defendant claims that the trial judge erred in overruling his objection to the prosecutor's remark during cross-examination of one of the defendant's expert witnesses during the sentencing phase. The witness was asked, "Have you been in this building for three years prosecuting cases and seeing the crime that is going through this city?" The question was provoked by the witness' assertion that his own beliefs were better grounded in research than the prosecutor's. The prosecutor's remark, while unnecessarily argumentative, was not of such a nature as to prejudice the jury against the defendant. C.Cr.P. 771.

This assignment lacks merit.

Assignments of Error Nos. 29-32

In Assignment No. 29 defendant contests the overruling of his motion for mistrial because of improper prosecutorial argument. In his closing argument during the sentencing phase, the

prosecutor compared the instant murder to a butcher's slaughter of a calf. There were facts in the record to support this comparison. The victim sustained three eight inch knife wounds, one of which completely severed a rib. She lost at least two quarts of blood which was spattered about the house. The remark, though crude, trite and graphic, did not exceed the permissible scope of argument. C.Cr.P. 774; State v. Governor, 331 So.2d 443, 451 (La. 1976).

This assignment lacks merit.

Assignment No. 30 concerns a remark by defense counsel during his closing argument at the sentencing hearing. He said that, since the defendant is an indigent, he would not have the "pull" to ever obtain a pardon. Defendant contends that reversible error occurred when the trial judge sustained the state's objection to the remark. Defense counsel maintains that the remark was designed to convey to the jurors that a life sentence really means a life sentence. It was probably wrong for the prosecutor to object to such a self-evident remark, and probably error to sustain the objection. Nevertheless, the argument was made, and the jury heard it. Sustaining the objection could not have erased the idea argued by defense counsel.

This assignment lacks merit.

Assignment No. 31 concerns a reference by the prosecutor in his closing argument in the sentencing phase to the fact that death cases are reviewed by the Louisiana Supreme Court:

> " . . . And the law says in this State that the death penalty is appropriate in this instance. Now, the top of the Louisiana legislature decision, the Louisiana Supreme Court reviews each and every case in which the death penalty is imposed. . . ."

Defendant assigns error to the trial judge's overruling of his objection to this reference to appellate review. In State v. Berry, supra, (per curiam denial of rehearing), this court declined to impose an absolute prohibition against such remarks, and adopted instead a

case-by-case approach. The danger inherent in such references is that the jury might be induced to disregard its responsibility. This court in Berry stated:

> " . . . If the reference conveys the message that the jurors' awesome responsibility is lessened by the fact that their decision is not the final one, or if the reference contains inaccurate or misleading information, then the defendant has not had a fair trial in the sentencing phase, and the penalty should be vacated." 391 So.2d at 418.

In the instant case, the reference to appellate review was preceded by an explanation of the narrow circumstances under which the death penalty has been deemed appropriate by the legislature and the courts. The prosecutor stressed that the jury must remain within specific guidelines and must find the existence of at least one aggravating circumstance before recommending death. He urged the jurors to impose death, but his argument did not minimize the primary duty of the jury because of appellate review. Rather, he argued that the facts of this case fell within those narrow circumstances under which death is an appropriate penalty. The argument did not serve to lessen the significance of the jury's role.

This assignment lacks merit.

Assignment No. 32 is taken to the entire rebuttal argument of the prosecution on the sentencing phase. Defense counsel's closing argument was a generalized attack on the deterrence function of the death penalty. Echoing the testimony of one of the defense's expert witnesses, counsel stressed that it is the certainty, and not the severity of punishment that serves as a deterrent. The prosecution's rebuttal was designed to explain how death has been deemed an appropriate penalty only under narrow circumstances, and that since the facts of this case fell within those circumstances, death was appropriate.

In explaining to the jury why the state sought the death penalty, the prosecutor asked the jury "to give us justice."

The substance of his argument was that since the victim was unjustly killed, her killer should be executed. Some of the closing argument might be interpreted as a plea for the jury to disregard the constitution and the law, and simply do to the defendant what they had found out the defendant had done to the victim, and take his life. The prosecutor tried to say that in asking for the death penalty, he asked for "nothing out of the ordinary," and that the jury should simply give the defendant the same that the defendant gave the victim.

If it were not evident (see discussion under Assignment of Error No. 33) that this jury came close to a deadlock on the penalty, the remarks of the district attorney in closing argument would not have assumed such importance. Although there is overwhelming proof of defendant's guilt, it is by no means overwhelmingly certain that the jury would have brought in a recommendation for death in the absence of any persuasive material in the record.

Oral argument of lawyers is of obvious importance in a jury case. The lawyers on each side are obligated to attempt to persuade the jury that their respective positions are correct. The practice of law, however, is an art that requires a degree of sophistication and discrimination; there are ways to persuade other than to appeal to base emotions.

A system of capital punishment which permits the exaction of an eye for an eye, a tooth for a tooth, and a life for a life will not pass constitutional muster. Such argument is improper. To seem to urge a jury to do to the defendant what the defendant had done to the victim (to murder him?) is improper. To refer to the death penalty as "nothing unusual," and as not a harsh penalty is inaccurate.

When this argument is considered as a whole, it loses much of its objectionable flavor. Almost all of it was in answer to arguments made by the defense. The subjects covered in the

rebuttal were not inappropriate. An intelligent jury could not reasonably have believed that the prosecutor was urging them to disregard the law as given to it in the instructions of the trial judge.

There is no reversible error in these assignments.

Assignment of Error No. 33

During the sentencing hearing the jurors deliberated forty-five minutes, then announced to the trial judge that they were hung. They requested additional instructions on the procedure to follow in the event that unanimity could not be obtained. The jurors were instructed that if a jury is unable to agree within a reasonable time, the trial judge must impose a sentence of life imprisonment. The judge announced that in his opinion forty-five minutes was a relatively short period of time, but he declined to set arbitrary time limits on what constitutes a reasonable time. After additional deliberation for an hour, the jury unanimously recommended death.[4]

Defense counsel lodged an objection when the jurors were allowed to resume deliberations after their announcement that they were hung. Counsel argued to the judge that under C.Cr.P. 905.8 a trial judge is vested with no discretion to allow additional deliberations. Counsel has expanded the grounds for his objection in brief and in oral argument before this court. He asserts that, by informing the jurors of the effect of deadlock and allowing further deliberations, the trial judge implied that he wanted the jurors to impose the death penalty in this case.

The first issue presented in this assignment is whether the trial judge is vested with discretion to allow a jury to continue deliberations once that jury has announced that it is hung. The applicable statute, C.Cr.P. 905.8, does not address the issue. The trial judge in this case imposed the requirement that a reasonable time must elapse before a jury can be declared to be deadlocked.

Under defense counsel's interpretation, the judge lacks power to allow additional deliberations. Under this construction a jury determination that it is hung after a few minutes of deliberation must be observed. This construction is unacceptable. Rather, we believe that implicit in this statute is the concept that the trial judge is the one who determines when a jury is deadlocked. His decision will not be overturned except upon a showing of palpable abuse of discretion. State v. Governor, supra. No abuse has been shown here.

The second issue presented concerns the combined impact of the judge's decision to allow further deliberations and his mid-deliberation charge on the effect of deadlock. The argument is advanced that, since the jurors were aware that the defendant would receive life imprisonment regardless of their recommendation, they must have surmised that they were being sent back because the judge wanted them to recommend the death penalty. Careful examination of the trial judge's instructions to the jurors is convincing that this argument is without merit. The trial judge told the jurors that if they could not agree despite further deliberations, they should tell him so.

This assignment lacks merit.

Assignments of Error Nos. 34 and 37

By Assignment No. 34 defendant contends that the trial judge erred in accepting the jury's sentence recommendation. By Assignment No. 37 defendant contends that imposition of the death penalty in this case is unconstitutional because, under the facts, it constitutes cruel and unusual punishment. These assignments are covered in the section entitled sentence review, infra.

Assignment of Error No. 35

By this assignment defendant contends that the trial judge erred in denying his motion for new trial. Five grounds were asserted in this motion. These grounds are duplicative of

Assignments of Error Nos. 4, 34, 36, 33 and 1, which have been found to be without merit. They are discussed elsewhere in this opinion.

This assignment lacks merit.

Assignments Neither Briefed Nor Argued

Because this is a capital case, this court reviews those assignments of error which are neither briefed nor argued. State v. Jones, 332 So.2d 466 (La. 1976).

By Assignment No. 7 defendant claims the trial judge erred when he denied defendant's motion for bail. The motion was filed after defendant's indictment, so the burden was on him to "show that the proof is not evident or the presumption is not great." C.Cr.P. 313. The evidence against defendant consisted of the testimony of two eyewitnesses. Therefore, it is highly improbable that defendant could have met the burden imposed by C.Cr.P. 313. This assignment lacks merit.

Assignment No. 9 concerns defendant's unsuccessful motion for mistrial because of the unexplained absence of a potential juror whose name was called from the petit jury venire. The grounds for mistrial listed in C.Cr.P. 775 do not include the above situation, and no prejudice was asserted by defendant because of this potential juror's absence. This assignment lacks merit.

By Assignment No. 11 defendant alleges that the trial judge erred in allowing a state challenge for cause of a juror (No. 21), Jeanmarie Belonga. The record discloses, however, that the state exercised a peremptory challenge on this proespective juror. It appears from the record that the parties were in the process of selecting an alternate juror when the state exercised a peremptory challenge. The record does not disclose how many peremptory challenges were allowed each party. Nor did defendant's objection complain that the state had exceeded the number of peremptory

challenges granted it for the selection of the alternate juror. C.Cr.P. 789. Rather, defendant's objection complained that the juror was "well qualified." This assignment appears to lack merit.

Assignment No. 26 provides: "The court committed reversible error in allowing the same testimony and evidence to be admitted at the bifurcated hearing as was introduced by the State in the part of the trial relative to guilt or innocence." This assignment is palpably without merit. C.Cr.P. 905.2 specifically authorizes the jury to "consider any evidence offered at the trial on the issue of guilt." Further, our statute was derived from the Georgia statute specifically approved by the United States Supreme Court in Gregg v. Georgia, supra. This assignment is without merit.

Assignment No. 27 concerns the admission of a photograph of the decedent at the sentencing phase. Defendant contends that the trial judge committed reversible error in admitting the photograph because it is "gruesome and prejudicial." Photographs of the victim are probative of "the circumstances of the offense," which is by law the focus of the sentencing hearing. C.Cr.P. 905.2. This assignment lacks merit.

By Assignment No. 36 defendant contends that the trial judge erred in denying his motion in arrest of judgment. The motion was based on two arguments, one of which formed the basis of Assignment of Error No. 33, discussed elsewhere in this opinion and found to be without merit. The second ground asserts that the trial judge erred in informing the jury during the guilt phase that it could consider the responsive verdict of second degree murder because of this court's decision in State v. Booker, 385 So.2d 1186 (La. 1980). Defendant's reliance upon Booker is misplaced. That case concerned the 1978 legislative revision of the second degree murder statute. 1978 La. Acts, No. 796, amending R.S. 14:30.1. The instant murder occurred in the early morning hours of September

10, 1977. The 1977 amendment to the second degree murder statute had become effective on September 9, 1977. 1977 La. Acts, No. 121, amending R.S. 14:30.1. The 1977 amendment was not confined to felony murder, but included a provision on specific intent murder. Thus, the second degree murder statute applicable to the instant prosecution was responsive to the charge of first degree murder. Furthermore, second degree murder is a noncapital offense, and could have only benefitted defendant. Since the jury found defendant guilty of first degree murder, there could have been no prejudice. This assignment lacks merit.

Sentence Review

This court reviews every death sentence to determine if it is excessive. C.Cr.P. 905.9. In evaluating whether the death penalty is excessive in a particular case, the court determines:

> "(a) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors, and
>
> (b) whether the evidence supports the jury's finding of a statutory aggravating circumstance, and
>
> (c) whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Supreme Court Rule 28, § 1.

There is no evidence that passion, prejudice or any other arbitrary factor influenced the jury in its recommendation of death. Both the victim and the defendant are black.

Aggravating Circumstances

The jury in the instant case found three of the aggravating circumstances listed in C.Cr.P. 905.4 to be present:

> "(a) The offender was engaged in the perpetration or attempted perpetration of aggravated rape, aggravated kidnapping, aggravated burglary, or armed robbery;
>
> . . .

(d) The offender knowingly created a risk of death or great bodily harm to more than one person;

. . .

(g) The offense was committed in an especially heinous, atrocious or cruel manner." (C.Cr.P. 905.4 (as it appeared prior to 1979 La. Acts, No. 74, § 2)).

Each of these aggravating circumstances will be discussed separately.

C.Cr.P. 905.4(a)

The jury found that the murder occurred while the defendant was engaged in the perpetration of an aggravated burglary. R.S. 14:60. The record evidence supports this finding. The defendant unlawfully entered the victim's bedroom through a window. He was armed with a knife which he used to stab both the murder victim and her daughter. Defendant does not contest the jury's finding on this aggravating circumstance, but argues that since the burglary was committed to facilitate the murder, the underlying burglary should be disregarded.

The thrust of defendant's argument is that a murderer who breaks into his victim's home in order to commit the murder is no more deserving of death than a murderer who waits for his victim to come out onto the porch or who shoots his victim by aiming his gun into the window. He points out that aggravated kidnapping, aggravated rape and armed robbery, the other crimes listed in C.Cr.P. 905.4(a),[5] cannot be committed with homicide as the only end result. He thus argues that the legislature did not intend for aggravated burglary to be an aggravating circumstance if the only motive in committing the burglary was murder of the victim.

Defendant's argument disparages the seriousness of the offense of aggravated burglary. The legislature has determined that aggravated burglary is a distinct crime, the maximum penalty for

which is thirty years at hard labor. R.S. 14:60. It is not unreasonable to conclude that the legislature deemed it more reprehensible to break into a home and kill the occupant than to commit murder in a public place.[6] We therefore reject defendant's argument.

C.Cr.P. 905.4(d)

The jury found that the defendant "knowingly created a risk of death or great bodily harm to more than one person." C.Cr.P. 905.4(d). This aggravating circumstance was proved beyond a reasonable doubt. Theodise Collins, the decedent's daughter, testified that she was stabbed in the back by the defendant who told her he was going to kill her. In State v. Culberth, 390 So.2d 847, 850 (La. 1980), we noted that "this aggravating circumstance is established when the defendant by a single and consecutive course of conduct contemplates and causes a great risk to more than one person." This circumstance was found not to exist in Culberth because the defendant, although telling an intended victim, "you're next," did not pursue the man when he ran behind a car. In the instant case, however, Theodise was actually pursued and stabbed by the defendant, and was hospitalized for almost two weeks for a collapsed lung. Thus, we conclude that the jury properly found C.Cr.P. 905.4(d) proved beyond a reasonable doubt.

C.Cr.P. 905.4(g)

Although the jury found the instant offense to have been committed in an "especially heinous, atrocious or cruel manner," this finding cannot stand. It is true that the murder was brutal--the victim lost over two quarts of blood, her lungs were punctured and one of her ribs was severed. Her death was not instantaneous, and she lived long enough to call out for her daughter and reach for the telephone.

Nonetheless, in order for a murder to be "especially heinous," there must exist evidence that there was

"torture or the pitiless infliction of unnecessary pain on the victim." State v. English, 367 So.2d 815, 823 (La. 1979). State v. Clark, 387 So.2d 1124 (La. 1980), provides an example of what is meant by "especially heinous." In that case the defendant stabbed the victim thirty-five times before shooting him with a gun. In the instant case, the "wounds were inflicted to kill, not to maim or to inflict pain." State v. Culberth, supra, at 851. While there is some evidence in this case that the offense was heinous and cruel, it was not proved beyond a reasonable doubt that the instant offense was especially heinous.

Having found the evidence insufficient to support one of the statutory aggravating circumstances, we must decide whether the sentence imposed by the jury can stand. Appellant argues that this court is without power to affirm a death sentence if one of the aggravating circumstances found by the jury does not exist. We have never directly addressed this issue, although in two cases we declared it unnecessary to consider whether the evidence supported all the aggravating circumstances so long as one aggravating circumstance was proved beyond a reasonable doubt. State v. Williams, supra, cert. denied, 49 U.S.L.W. 3494 (1981); State v. Martin, supra, cert. denied, ____U.S.____, 101 S.Ct. 540, 66 L.Ed.2d 297 (1980).

Defendant urges this court to follow the reasoning of the Court of Appeals for the Fifth Circuit in Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980). In that case the Fifth Circuit held unconstitutional a death sentence "imposed when one of the aggravating circumstances was later held to be unconstitutional even though there were two other aggravating circumstances, either of which by itself would be legally sufficient to permit the jury to impose the death penalty and as to which there is no uncertainty." Id. at 406.

Petitioner Stephens, convicted of murder, was sentenced to death by a Georgia jury which found three statutory

aggravating circumstances. Although one of the circumstances was declared unconstitutional after Stephens' conviction, Arnold v. State, 236 Ga. 534, 224 S.E.2d 386 (1976), the Georgia Supreme Court affirmed Stephens' sentence because "the evidence supports the jury's findings of the other aggravating circumstances . . ." Stephens v. State, 237 Ga. 259, 262, 227 S.E.2d 261, 263, cert. denied, 429 U.S. 986, 97 S.Ct. 508, 50 L.Ed.2d 599 (1976).

Stephens first sought habeas corpus relief in the Georgia state courts. In his petition he reiterated his claim that the jury's consideration of the unconstitutional statutory aggravating circumstance vitiated the sentence. The Georgia Supreme Court based its denial of relief on the provisions of its capital sentencing law. Stephens v. Hopper, 241 Ga. 596, 247 S.E.2d 92 (per curiam), cert. denied, 439 U.S. 991, 99 S.Ct. 593, 58 L.Ed.2d 667 (1978). The provision declared unconstitutionally vague had allowed the jury to consider as a statutory aggravating circumstance the fact that "the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions." Ga. Code Ann. § 27-2534.1(b)(1). However, under Georgia law, in capital cases, a defendant's criminal record is before the jury for its consideration regardless of whether it arguably evidences a "substantial history of serious assaultive criminal convictions." See Ga. Code Ann. § 27-2503(a). Thus, the jury would have been apprised of, and could have legally considered, Stephens' criminal record in any event.

The Georgia court's treatment of Stephens' claim appears appropriate in the context of Georgia's capital sentencing scheme, in which the jury's finding of a statutory aggravating circumstance functions as a threshold for the death penalty. If the jury finds one of the enumerated aggravating circumstances to have been proved beyond a reasonable doubt, then it is authorized to consider the death penalty as the sentence in the case. In determining

the appropriate penalty, the jury is authorized to consider, in addition to the statutory aggravating circumstances, "any mitigating circumstances or aggravating circumstances otherwise authorized by law." Ga. Code Ann. § 27-2534.1(b). Since Stephens' prior criminal record is a nonstatutory aggravating circumstance which the jury is authorized to consider, Ga. Code Ann. § 27-2503(a), the jury is entitled to base its recommendation in part upon that criminal record. See also Hardy v. State, 245 Ga. 272, 264 S.E.2d 209 (1980).[7]

Because Stephens' jury could legally consider his prior criminal record, and because there were other valid statutory aggravating circumstances, Stephens' sentence was not impaired. His prior criminal record is highly probative and relevant to the jury's determination of the character of the defendant, a primary focus in the sentencing hearing. Of course, the imposition of death would be unconstitutional if the jury's recommendation were based exclusively upon an invalid statutory circumstance, regardless of whether the provision were invalid on its face or as applied to a particular set of facts. Cf. Godfrey v. Georgia, ___ U. S. _____, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980).

In vacating Stephens' death sentence, the Fifth Circuit noted that the "presence of the unconstitutionally vague circumstance also made it possible for the jury to consider several prior convictions of petitioner which otherwise would not have been before it." Stephens v. Zant, supra, at 406. Nevertheless, those prior convictions were properly before the jury for its consideration. In spite of the finding of the Fifth Circuit in Stephens v. Zant, even if prior convictions cannot be used as "aggravating circumstances," they will be before the jury by virtue of Ga. Code Ann. § 27-2503(a). Stephens v. Zant, therefore, is not persuasive.

At present we know of no constitutional requirement that a death sentence be vacated whenever the jury errs in its

finding of a statutory aggravating circumstance.[8] We note that the Georgia legislature has directed the Georgia Supreme Court to determine whether "the evidence supports the jury's or judge's finding of a statutory aggravating circumstance . . .," Ga. Code Ann. § 27-2537(c) (emphasis added), and that this provision was quoted with approval in Gregg v. Georgia, supra. As stated by the Georgia Supreme Court in Gates v. State, 244 Ga. 587, 599, 261 S.E.2d 349, 358 (1979):

> "Where two or more statutory aggravating circumstances are found by the jury, the failure of one circumstance does not so taint the proceedings as to invalidate the other aggravating circumstance found and the sentence of death based thereon. Gregg v. State, 233 Ga. 117, 127-128 (210 SE2d 659) (1974); Gregg v. Georgia, supra, 428 U.S. at 161-162. . . . The erroneous application of the statutory aggravating circumstance of 'depravity of mind to the victim' . . . does not invalidate the valid parts of the verdict of the jury."

Proportionality

The purpose of the proportionality inquiry is to determine "whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Supreme Court Rule 28, § 1(c).

The Crime

Ronald Monroe broke into the victim's home during the middle of the night, as she lay sleeping with her two children. He stabbed Lenora Collins to death and attempted to kill her daughter Theodise. Although Theodise's lung collapsed when Monroe stabbed her in the back, she escaped further injury by locking herself in the bathroom. Monroe threatened to kill the victim's son Joseph, but Joseph avoided injury by hiding behind an automobile. According to the evidence adduced at trial, the defendant's motive for the killing was anger because the victim's mother had decided to evict the defendant's family from t. ir residence.

The Defendant

At the time of this offense, the defendant was twenty-two years old. He was married with a three year old child, although this fact was not brought out at his trial. He quit school after the sixth grade, and has no significant work history. He had a few run-ins with juvenile authorities, and one adult arrest for fighting.

The defense assigns as a mitigating factor in this case that defendant was mentally impaired at the time of the offense because of intoxication. There is testimony in the record by defendant and his mother that, at the time of this offense, defendant was sleeping off a drunk. However, this testimony was introduced to substantiate defendant's proffered alibi defense. There is other evidence in the record that the defendant neither appeared intoxicated nor smelled of alcohol.

Comparison With Similar Cases

The instant case is the first occasion this court has had to review the proportionality of a death sentence imposed in Orleans Parish since our laws were amended to conform to the constitutional requirements of Gregg v. Georgia, supra. Although this is the fourth Orleans Parish death case to reach this court, new trials were ordered in two cases, and the sentence reduced to life imprisonment in the third.

The first Orleans Parish death case to reach this court on appeal was Ronald Monroe's first conviction for the instant murder. The jury in the first trial found the same aggravating circumstances as did the jury in the instant prosecution. The first conviction was reversed, however, because an assistant district attorney was allowed to serve as juror. State v. Monroe, 366 So.2d 1345 (La. 1978).

The second case involved the murder of two employees during an armed robbery of a fried chicken restaurant by defendant Gerald Parker and an accomplice. Parker ordered the employees into a cooler, then shot them in the head. In recommending that Parker be sentenced to death, the jury relied upon three aggravating circumstances. They found that the murders occurred during the commission of an armed robbery, that the defendant knowingly created a risk of death to more than one person, and that the offense was committed in an especially heinous manner. This court reversed the conviction, and remanded for a new trial because the jury was not properly sequestered. State v. Parker, 372 So.2d 1037 (La. 1979). In Parker's second trial, the jury found him guilty of second degree murder, and he was sentenced to life imprisonment.

The third case, discussed previously in this opinion, involved the stabbing death of a woman by her former boyfriend. In that case, State v. Culberth, supra, the jury that recommended death found three aggravating circumstances: first, that the defendant created a risk of death to more than one person; second, that the defendant had a previous conviction for an unrelated murder; and third, that the offense was especially heinous. On appeal this court concluded that none of the aggravating circumstances existed, and the sentence was reduced to life imprisonment.

One case, currently before this court on appeal, State v. Mattheson, No. 80-KA-2082, involves the armed robbery of a beauty salon by Harold Mattheson and his wife. Upon entering the salon, Mattheson killed the receptionist by shooting her in the head with a sawed-off shotgun. The remaining twenty-three customers and employees were either bound or forced to lie face down on the floor. During the robbery, Mattheson shot a woman in the leg as she lay prostrate on the floor. In recommending that Mattheson receive the death penalty, the jury found three aggravating circumstances:

one, the murder was committed during an armed robbery; two, the offense was committed in an especially heinous manner; three, the offender knowingly created a risk to more than one person.

Another case currently before this court on appeal, State v. Marshall, No. 81-KA-0426, also occurred during an armed robbery. The victim and two friends were walking toward Canal Street after becoming lost near the Iberville Project. Joseph Marshall ran in front of them, brandishing a pistol, and demanding money. The victim was shot and killed when he disregarded Marshall's demand. The defendant, who was sixteen at the time of the offense, was sentenced to death based on the jury's finding of two aggravating circumstances: one, the offense was committed during an armed robbery; two, the offender knowingly created a risk of death to more than one person.

A case not yet appealed involves the murder of a man during an attempted armed robbery and aggravated burglary. Defendant Donald Jordan and his accomplices knocked at the door of the victim's home ostensibly to use the telephone. The victim was shot to death when he refused the men admittance. The sole aggravating circumstance found by the jury was that the offense was committed during the perpetration or attempted perpetration of an armed robbery and aggravated burglary.

There have been seventy first degree murder prosecutions in Orleans Parish since January 1, 1976.[9] Three resulted in verdicts of not guilty by reason of insanity, nine resulted in manslaughter convictions, eleven in second degree murder convictions, and forty-seven resulted in first degree murder convictions. Of these first degree murder convictions, the jury recommended life imprisonment in thirty-two cases, the jury failed to agree in eight cases, and the jury recommended death in seven cases, including Monroe's case.

After comparing Monroe's case to the other first

degree murder cases from Orleans Parish, we conclude that the sentence meted out to Monroe is proportionate with sentences imposed in similar cases. Although Monroe's case is dissimilar to Parker, Mattheson, Marshall and Jordan, in that the latter involve armed robberies in which the victims were random members of society, Monroe is similar to Parker, Mattheson and Marshall in that he created a risk of death to more than one person. A review of the first degree murder convictions in Orleans Parish reveals that juries are more apt to recommend death when more than one person is endangered than when the aggravating circumstance is armed robbery.

Nor does the defendant's age make the sentence disproportionate. Joseph Marshall was sixteen at the time of his offense, six years younger than Monroe. While it is true that Marshall's juvenile record is more extensive than Monroe's criminal record, the two men are alike in that neither had previously committed crimes against the person.

Three additional Orleans Parish first degree murder cases merit discussion because of certain similarities to the instant case. In each case, the defendant was convicted of first degree murder and sentenced to life imprisonment. All three convictions are currently on appeal to this court.

In State v. Chew, No. 80-KA-2675, the defendant and his girlfriend were burglarizing the victim's home when she unexpectedly returned. The defendant choked her to death with a "choke wire" he had made. As she begged for her life, he demanded that she tell him where her money was. The Chew and Monroe cases are similar in that both involve the murder of a woman in her home during an aggravated burglary. Unlike Monroe, however, Chew's decision to murder his victim was a spontaneous one made during the burglary. Chew thought he had planned his burglary at a time when the victim would not be home. Monroe, by contrast, contemplated and planned to murder his victim in cold blood as she lay sleeping.

State v. Joseph, No. 80-KA-2787, is very similar to the Chew case. The defendant was burglarizing his former next door neighbor's house when the owner's daughter unexpectedly arrived. He decided to kill the victim when she called him a fool. Joseph received a sentence of life imprisonment when the jury was deadlocked at the sentencing deliberations.

Both Chew and Joseph involve murders committed during aggravated burglaries. In neither case did the decision to kill precede the perpetration of the burglary and in neither case was there a risk of harm to more than one person.

The third case is State v. Walker, No. 80-KA-2544. The defendant's mother lived in the same apartment building as the victim. In the middle of the night, the defendant broke into Cynthia John's apartment and killed both Cynthia and her eight year old daughter by crushing their skulls with a hammer, which, according to one state witness, he had borrowed before the murders because "there was something he had to do." When he returned the hammer to its owner he confessed the killings and said he did it because he loved the sight of blood. From evidence adduced at trial it appears that Walker, a heavy user of drugs, was mentally impaired at the time of the offense.

Factually, the Monroe and Walker cases are very similar. Both men killed neighbors during aggravated burglaries, and in each case there was present the risk of death to more than one person. Both Monroe and Walker were young at the time of the offenses, and both men at the time of their sentencing were fathers of small children. Nonetheless, Monroe received the death penalty and Walker received a sentence of life imprisonment.

It would be mere speculation for this court to evaluate why Walker received life imprisonment. It is possible that the jurors in the Walker case gave importance to the possible mental impairment resulting from drug abuse, a factor not present in the Monroe case.

Additionally, the evidence of Monroe's guilt was strong and direct; by contrast, the evidence adduced against Walker consisted of testimony of friends to whom defendant had confessed.

Nonetheless, the decision of the Walker jury to afford that defendant mercy does not render Monroe's sentence excessive. Monroe perpetrated his crime in a most cold blooded fashion. Monroe's decision to kill was not a spontaneous one induced by drugs. Rather, he broke into his victim's home in the middle of the night as she lay sleeping with her two children. He mercilessly stabbed her to death and tried to kill her daughter. There is no evidence that the victim had angered Monroe by anything she had said or done; rather, Monroe sought revenge against the victim because of something the victim's mother had done. Under these circumstances, the sentence of death is neither excessive nor disproportionate.

For the foregoing reasons, the conviction and sentence are affirmed.

1

Implicit in defense counsel's argument are two assumptions which we do not decide, but accept only to enable resolution of the merits of the assignments. First, defense counsel assumes that his failure to file a motion to suppress ought not bar his objection at trial to the admissibility of the evidence. At the time of the trial, C.Cr.P. 703 provided simply that a trial judge in his discretion could allow a filing of a motion to suppress during the trial. A 1980 amendment to that article provides that failure to file a motion to suppress prevents a defendant from objecting at trial to the evidence's admissibility. 1980 La.Acts, No. 431, amending C.Cr.P. 703. Technically, the issue before this court is whether defense counsel's objection at trial can be considered a motion to suppress, and, if so, whether the trial judge abused his discretion in denying the motion.

Defendant's second assumption is that Payton v. New York, supra, is retroactive. After submission of the instant case, this court decided State v. Friddle, _____ So.2d _____ (La. 1981) (No. 80-K-1593), in which it was held that Payton will not be applied retroactively. The arrest in this case occurred on September 10, 1977. Payton v. New York, supra, was decided April 15, 1980. Nonetheless, we assume the retroactivity of Payton in order to address the merits of defendant's Fourth Amendment claims.

2

Testimony at trial by the victim's mother and the former owner of the house in which the victim and the defendant's family lived showed that, although the defendant's family had lived there about eight years, the victim's mother purchased the house a few days before the murder and planned to evict the defendant's family. No objections were raised during

the testimony of these two witnesses. However, an objection was lodged when the state sought to introduce the eviction letter and registered mail receipt signed by the defendant on the afternoon before the murder.

3
For a fuller discussion of nonresponsive lesser included offenses, see Assignment of Error No. 36, infra.

4
We note that the instant case differs from State v. Williams, 392 So.2d 619 (La. 1980) (on rehearing). In that case, the jurors, after deliberating three hours, inquired whether the verdict had to be unanimous. Unlike the instant case, the jurors in Williams were not informed of the effect of deadlock. Rather, the trial judge reiterated from his general charge that any jury recommendation had to be unanimous. The jurors deliberated an additional forty-five minutes, then unanimously recommended death. This court vacated the sentence because the jurors were never informed of the effect of deadlock.

Our concern in Williams was over the possibility that individual jurors might be swayed to join the majority because of their fear that lack of unanimity would require either a new sentencing hearing or a new trial on the merits. That possibility is not presented in the instant case since the jurors, prior to their recommendation, learned that the effect of jury deadlock is the automatic imposition of a sentence of life imprisonment.

5
When our capital sentencing law was enacted, these four crimes were the only ones listed. 1976 La.Acts, No. 694, adding C.Cr.P. 905.4(a). A 1979 amendment added the crimes of aggravated arson, aggravated escape and simple robbery. 1979 La.Acts, No. 74. Since the instant crime occurred prior to the 1979 amendment, the 1976 version of the statute was in effect.

6
Although defense counsel has cited several North Carolina cases for our consideration, they do not support appellant's position.

In State v. Cherry, 257 S.E.2d 551 (N.C. 1979), the defendant was convicted of murder and sentenced to death. The murder occurred during an armed robbery, and the defendant was convicted of felony murder, a capital offense in North Carolina. N.C. Gen. Stat. § 14-17. The underlying armed robbery was the sole aggravating circumstance relied upon by the jury as justification for the death penalty. N.C. Gen. Stat. § 15-2000(e)(5). The North Carolina Supreme Court vacated the sentence. The court reasoned that, since felony murder requires no premeditation, it would be unfair to allow the underlying felony to function both as the basis for the conviction and as an aggravating circumstance.

The rule of Cherry is limited to an unintentional felony murder, and is inapplicable where the murder was premeditated, as State v. Goodman, 257 S.E.2d 569 (N.C. 1979), makes clear. Of course, in this state felony murder is not first degree murder, but is second degree murder. R.S. 14:30.1. Thus, the reasoning of Cherry is not applicable.

7
The Florida Supreme Court has affirmed convictions based in part upon nonstatutory aggravating circumstances, Elledge v. State, 346

So.2d 998 (Fla. 1977); Sawyer v. State, 313 So.2d 680 (Fla. 1975), cert. denied, 428 U.S. 911, 96 S.Ct. 3227, 49 L.Ed.2d 1220 (1976), but has "left unclear the extent to which nonstatutory aggravating circumstances may be considered." Dix, Appellate Review of the Decision to Impose Death, 68 Geo.L.J. 97, 136 (1979).

8

Defense counsel in brief has called this court's attention to the North Carolina decision of State v. Goodman, 257 S.E.2d 569 (N.C. 1979), which he claims supports the position he advocates. On the contrary, the North Carolina Supreme Court adopted a type of harmless error rule to aid it in its determination of whether a sentence based in part on a nonexistent aggravating circumstance can be affirmed on appeal. The court did vacate the sentence in that case, but its decision to do so was based upon the "highly questionable quality and credibility of the state's primary evidence." Id. at 587.

9

In compliance with Supreme Court Rule 28, § 4, the Orleans Parish District Attorney has supplied this court with a memorandum of all first degree murder prosecutions occurring in that parish since January 1, 1976. Four cases have been disregarded as erroneously included in the memorandum: Joseph Jenkins, No. 156-191 "G" (sentenced in 1957); Roy Hollingsworth, No. 231-123 "J" (sentenced in 1973); Michael Williams, No. 240-853 "C" (prosecuted for second degree murder); and Peter Mercadel, No. 252-940 "C" (prosecuted for second degree murder).

Additionally, defense counsel has called to our attention the case of Joseph Marshall, discussed in the text of this opinion.

SUPREME COURT OF LOUISIANA

NO. 80-KA-2137

STATE OF LOUISIANA

VERSUS

RONALD MONROE

DENNIS, Justice, concurring in part and dissenting in part.

I respectfully concur in the majority's affirmance of the defendant's conviction and dissent from its affirmance of his death sentence.

The majority opinion finds the evidence insufficient to support one of the statutory aggravating circumstances but, nevertheless, affirms the conviction because it "know[s] of no constitutional requirement that a death sentence be vacated whenever the jury errs in its finding of a statutory aggravating circumstance." p. 26. I respectfully suggest that there is a well established constitutional principle applicable to this case which does require that the sentence be set aside.

On this record, if the jury believed the state's evidence, defendant's death sentence could constitutionally have rested on a finding that he was engaged in aggravated burglary, or that he knowingly created a risk of death or great bodily harm to more than one person. Since the finding of an aggravating circumstance is a necessary ground for, but does not require, the death penalty, however, it is impossible to say whether these grounds alone were the basis for the verdict. On the contrary, so far as

we can tell, it is equally likely that the jury would have recommended life imprisonment if it had not thought that the defendant was guilty of killing in an especially heinous, atrocious or cruel manner.

Several United States Supreme Court decisions have clear and forceful application here. In Bachellar v. Maryland, 397 U.S. 564, 90 S.Ct. 1312, 25 L.Ed.2d 570 (1970); Street v. New York, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969); Yates v. United States, 354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed.2d 1356 (1957); Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931), the high court held that a criminal conviction must be reversed if the jury could have based the verdict on an unconstitutional statutory ground, even though there were other valid statutory grounds which the jury in fact may have employed. In those cases, since the defendants' convictions "may have rested on an unconstitutional ground," [emphasis added] Bachellar v. Maryland, supra, 397 U.S. at 571, they were set aside.

There are, of course, distinctions between our case and those decided by the high court. We deal here with a verdict of death not guilt, and a statutory ground applied unconstitutionally rather than invalid on its face. But these differences only compel the verdict's reversal more urgently. If an ordinary criminal conviction which "may have rested" on an unconstitutional ground must be set aside, we clearly must reverse a death penalty having a possible unconstitutional ground, since a greater degree of reliability is called for when the death sentence is imposed. Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973, 989 (1978). A verdict based upon evidence insufficient for a finding beyond a reasonable doubt is just as unconstitutional as one based on a facially unconstitutional statute. Jackson v. Virginia,

443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980) is a correct application of the constitutional principle. The majority opinion misconstrues the basis of its holding. The court of appeal set aside the death penalty primarily because it was based in part on an unconstitutional statutory ground. The court pointed out that the circumstances "also made it possible for the jury to consider several prior convictions...." 631 F.2d at 406. But this latter statement is clearly secondary and not essential to its main holding based on Stromberg v. California and its progeny.

The Stromberg principle requires that the death penalty in this case be set aside also. Consistent with this principle the United States Supreme Court vacated and remanded for reconsideration in light of its decision in Godfrey v. Georgia, _____U.S._____, 100 S.Ct. 1759, 64 L.Ed. 2d 398 (1980) five Georgia death cases in which other aggravating circumstances besides the one the Georgia Supreme Court applied improperly in Godfrey, supra, had also been found by the jury. See Brooks v. State, 261 S.E.2d 379 (Ga. 1979), vacated and remanded, 100 S.Ct. 2937 (1980); Hamilton v. State, 259 S.E.2d 81 (Ga. 1979), vacated and remanded 100 S.Ct. 2936 (1980); Baker v. State, 257 S.E.2d 192, vacated and remanded 100 S.Ct. 2936 (1980); Collins v. State, 253 S.E.2d 729 (Ga. 1979), vacated and remanded 100 S.Ct. 2936 (1980); Davis v. State, 252 S.E.2d 443 (1979), vacated and remanded 100 S.Ct. 2934 (1980).

Moreover, I do not see how it rationally may be contended that a jury which erroneously believes it has legally found three aggravating circumstances to exist will not be more apt to recommend that the defendant be sentenced to death than a jury which correctly believes that the defendant

is guilty of a crime involving two aggravating circumstances. To think otherwise is to ignore the realities of a capital sentencing hearing. First, the jurors are usually told by the attorneys in opening statements about the various statutory aggravating circumstances and the importance of whether they find one to exist. Next, the focus of direct and cross-examination, evidentiary objections and arguments, will further underscore the crucial importance of their finding an aggravating circumstance. Next, the lawyers will argue at length over whether the evidence proves the existence of one or more aggravating circumstances. Finally, the trial judge in the dramatic final hour of the murder trial will further impress upon the jurors the importance of their duty of deciding whether aggravating circumstances exist. He will explain that the jury must find beyond a reasonable doubt that at least one aggravating circumstance exists before a sentence of death can be imposed. He will painstakingly read and explain to them each statutory aggravating circumstance. After all of this instruction, argument and testimony about aggravating circumstances, it is highly unrealistic and purely artificial to think that a jury which believes three aggravating circumstances exist will not be more likely to impose a death penalty than a jury which finds only two. Ordinary citizen jurors are likely to be led to the common sense conclusion that, if a defendant can be put to death for a murder involving just one aggravating circumstance, then the more aggravating circumstances found to exist the more likely it is that any mitigating circumstances are outweighed and that the death penalty is appropriate.

Finally, it should be pointed out that writ denials by the United States Supreme Court in cases in which the issue arose does not mean that the principle of Stromberg has no application in the penalty phase of a capital case. Writ

denials normally carry no implication or inference on the merits of a particular proposition. United States v. Kras, 409 U.S. 434, 93 S.Ct. 631, 34 L.Ed.2d 626 (1973). A "denial of certiorari means only that, for one reason or another, which is seldom disclosed, and not infrequently for conflicting reasons that have nothing to do with the merits and certainly may have nothing to do with any view of the merits taken by a majority of the Court, there were not four members of the Court who thought the case should be heard." Brown v. Allen, 344 U.S. 443, 492, 73 S.Ct. 397, 97 L.Ed. 469 (1953). It is obvious, therefore, that writ denials in cases where less than four justices voted to hear the merits cannot be viewed as impairing the principle of Stromberg.

Accordingly, I dissent from the affirmance of the death penalty in this case.

SUPREME COURT OF LOUISIANA

NO. 80-KA-2137

STATE OF LOUISIANA

VERSUS

RONALD MONROE

LEMMON, Justice, Concurring.

In my opinion this murder, committed in the presence of the victim's children after breaking into their home, was committed in an especially cruel manner.

Nevertheless, even if this aggravating circumstance found by the jury does not exist, I agree that the death sentence can be affirmed on the basis of the two aggravating circumstances that are clearly supported.

The jury need only find one statutory aggravating circumstance in order to recommend the death penalty. C.Cr.P. art. 905.3. If the jury finds more than one statutory aggravating circumstance and that finding as to one is clearly supported by the record, it is not necessary to overturn the death penalty because one (or more) of the additional statutory aggravating circumstances are not supported.

In recommending the death penalty, the jury may consider all aggravating circumstances, whether or not listed in the statute, and must find the existence of at least one that is listed in the statute. The underlying circumstances of this murder were properly

introduced into the record and properly considered by the jury, even if those circumstances are held as insufficient to legally qualify the murder as "especially cruel".

Finally, the Supreme Court of the United States has at least twice declined to review death penalties in cases in which one of the arguments was that only one of several aggravating circumstances found by the jury had been determined on review to be supported by the record.[1] State v. Martin, 376 So.2d 300 (La.1979), cert denied, ____U.S.____, 101 S.Ct. 540 (1980); State v. Williams, 383 So.2d 369 (La.1980), cert. denied, 49 U.S.L.W. 3494 (Dec.13,1981).

1. The decision in Stephens v. Zant, cited in the majority opinion, is distinguishable. One of the aggravating circumstances found by the jury in that case had subsequently been held facially unconstitutional in another case, and the Fifth Circuit was concerned about the effect on the jury of the presence for consideration of an unconstitutionally vague statutory circumstance. The court particularly voted that the fact of defendant's several prior convictions would not have been revealed to the jury except as evidence of the aggravating circumstance.

NEW ORLEANS, 70112

STATE OF LOUISIANA

V.

NO. 80-KA-2137

RONALD MONROE

In re: Ronald Monroe, Applying for Stay of Execution, the Criminal District Court, Parish of Orleans, No. 261-647, Hon. Oliver P. Schulingkamp, Judge.

O R D E R

On considering the application of Ronald Monroe that his execution, presently scheduled for August 19, 1981, be stayed,

IT IS ORDERED that execution of Ronald Monroe be and the same hereby is stayed until such time as the United States Surpeme Court takes final action on his petition for writ of certiorari or until such other time, in advance of that date, as this Court deems proper.

For the Court at New Orleans, Louisiana, this 5th day of June, 1981.

Chief Justice

SUPREME COURT OF LOUISIANA
A TRUE COPY

Frank J. Labranche, Jr.
Clerk of Court

homicide is of four grades:

(1) First degree murder.

(2) Second degree murder.

(3) Manslaughter.

(4) Negligent homicide.

No liability for criminal homicide shall attach unless the injured party dies within a year after the injury is inflicted. *(Amended by Acts 1973, No. 110, § 1.)*

§ 30. First degree murder

First degree murder is the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm.

Whoever commits the crime of first degree murder shall be punished by death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence in accordance with the recommendation of the jury. *(Amended by Acts 1976, No. 657.)*

§ 30.1 Second degree murder

Second degree murder is:

A. The killing of a human being when the offender is engaged in the perpetration or attempted perpetration of aggravated rape, aggravated arson, aggravated burglary, aggravated kidnapping, aggravated escape, armed robbery, or simple robbery, even though he has no intent to kill; or

B. The killing of a human being when the offender has a specific intent to kill, under circumstances that would be first degree murder under Article 30, but the killing is accomplished without any of the aggravating circumstances listed in Article 905.4 of the Louisiana Code of Criminal Procedure.

Whoever commits the crime of second degree murder shall be

imprisoned at hard labor for life and shall not be eligible for parole, probation, or suspension of sentence for a period of forty years. *(Amended by Acts 1976, No. 657; Added by Acts 1977, No. 121.)*

§ 31. Manslaughter

Manslaughter is:

(1) A homicide which would be murder under either Article 30 (first degree murder) or Article 30.1 (second degree murder), but the offense is committed in sudden passion or heat of blood immediately caused by provocation sufficient to deprive an average person of his self control and cool reflection. Provocation shall not reduce a homicide to manslaughter if the jury finds that the offender's blood had actually cooled, or that an average person's blood would have cooled, at the time the offense was committed; or

(2) A homicide committed, without any intent to cause death or great bodily harm,

(a) When the offender is engaged in the perpetration or attempted perpetration of any felony not enumerated in Articles 30 or 30.1, or of any intentional misdemeanor directly affecting the person; or

(b) When the offender is resisting lawful arrest by means, or in a manner, not inherently dangerous, and the circumstances are such that the killing would not be murder under Articles 30 or 30.1.

Whoever commits manslaughter shall be imprisoned at hard labor for not more than twenty-one years. *(Amended by Acts 1973, No. 127, § 1.)*

CHAPTER 3. SENTENCING IN CAPITAL CASES

Art.

905. Capital cases; sentencing hearing required.
905.1 Sentencing hearing jury; commencement.
905.2 Sentencing hearing; procedure and evidence.
905.3 Sentence of death; jury findings.
905.4 Aggravating circumstances.
905.5. Mitigating circumstances.
905.6. Jury; unanimous recommendation.
905.7. Form of recommendations.
905.8. Imposition of sentence.
905.9. Review on appeal.

Art. 905. Capital cases; sentencing hearing required

Following a verdict of guilty in a capital case, a sentence of death may be imposed only after a sentencing hearing as provided herein.

Added by Acts 1976, No. 634, § 1.

Art. 905.1. Sentencing hearing jury; commencement

A. Except as provided in Part B herein, the sentencing hearing shall be conducted before the same jury that determined the issue of guilt. The order of sequestration shall remain in effect until the completion of the sentencing hearing.

B. If an error occurs only during the sentencing hearing which would necessitate the declaration of a mistrial, or the granting of a new trial by the trial court, or if an appellate court finds an error that occurred only in the sentencing hearing which would necessitate a remand and a new trial, then the trial court shall be empowered to empanel a new jury under the same procedure set out in Title XXVI, Chapter 3 of The Louisiana Code of Criminal Procedure for determining only the issue of penalty, and the rule of sequestration shall apply to the new jury so empanelled.

Added by Acts 1976, No. 694, § 1. Amended by Acts 1977, No. 105, § 1.

Art. 905.2. Sentencing hearing; procedure and evidence

The sentencing hearing shall focus on the circumstances of the offense and the character and propensities of the offender. The hearing shall be conducted according to the rules of evidence. Evidence relative to aggravating or mitigating circumstances shall be relevant irrespective of whether the defendant places his character at issue. Insofar as applicable, the procedure shall be the same as that provided for trial in the Code of Criminal Procedure. The jury may consider any evidence offered at the trial on the issue of guilt. The defendant may testify in his own behalf. In the event of retrial the defendant's testimony shall not be admissible except for purposes of impeachment.

Added by Acts 1976, No. 694, § 1.

Art. 905.3. Sentence of death; jury findings

A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, recommends that the sentence of death be imposed. The jury shall be furnished with a copy of the statutory aggravating and mitigating circumstances.

Added by Acts 1976, No. 694, § 1.

Art. 905.4. Aggravating circumstances

The following shall be considered aggravating circumstances:

(a) the offender was engaged in the perpetration or attempted perpetration of aggravated rape, aggravated kidnapping, aggravated

burglary, aggravated arson, aggravated escape, armed robbery, or simple robbery;

(b) the victim was a fireman or peace officer engaged in his lawful duties;

(c) the offender was previously convicted of an unrelated murder, aggravated rape, or aggravated kidnapping or has a significant prior history of criminal activity;

(d) the offender knowingly created a risk of death or great bodily harm to more than one person;

(e) the offender offered or has been offered or has given or received anything of value for the commission of the offense;

(f) the offender at the time of the commission of the offense was imprisoned after sentence for the commission of an unrelated forcible felony;

(g) the offense was committed in an especially heinous, atrocious or cruel manner; or

(h) the victim was a witness in a prosecution against the defendant, gave material assistance to the state in any investigation or prosecution of the defendant, or was an eye witness to a crime alleged to have been committed by the defendant or possessed other material evidence against the defendant.

(i) the victim was a correctional officer or any employee of the Louisiana Department of Corrections who, in the normal course of his employment was required to come in close contact with persons incarcerated in a state prison facility, and the victim was engaged in his lawful duties at the time of the offense.

For the purposes of Subparagraph (b) herein, the term peace officer is defined to include any constable, marshal, deputy marshal, sheriff, deputy sheriff, local or state policeman, game warden, federal law enforcement officer, jail or prison guard, parole officer, probation officer, judge, attorney general, assistant attorney general, attorney general's investigator, district attorney, assistant district attorney, or district attorney's investigator.

Added by Acts 1976, No. 694, § 1. Amended by Acts 1979, No. 74, § 2, eff. June 29, 1979.

Art. 905.5. Mitigating circumstances

The following shall be considered mitigating circumstances:

(a) The offender has no significant prior history of criminal activity;

(b) The offense was committed while the offender was under the influence of extreme mental or emotional disturbance;

(c) The offense was committed while the offender was under the influence or under the domination of another person;

(d) The offense was committed under circumstances which the offender reasonably believed to provide a moral justification or extenuation for his conduct;

(e) At the time of the offense the capacity of the offender to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication;

(f) The youth of the offender at the time of the offense;

(g) The offender was a principal whose participation was relatively minor;

(h) Any other relevant mitigating circumstance.

Added by Acts 1976, No. 694, § 1.

Art. 905.6. Jury; unanimous recommendation

A sentence of death shall be imposed only upon the unanimous recommendation of the jury. If the jury unanimously finds the sentence of death inappropriate, it shall recommend a sentence of life imprisonment without benefit of probation, parole or suspension of sentence.

Added by Acts 1976, No. 694, § 1.

Art. 905.7. Form of recommendations

The form of jury recommendation shall be as follows:

"Having found the below listed statutory aggravating circumstance or circumstances and, after consideration of the mitigating circumstances offered, the jury recommends that the defendant be sentenced to death.

Aggravating circumstance or circumstances found:

s/ _____
Foreman"

or

"The jury unanimously recommends that the defendant be sentenced to life imprisonment without benefit of probation, parole or suspension of sentence.

s/ _____
Foreman"

Added by Acts 1976, No. 694, § 1.

Art. 905.8. Imposition of sentence

The court shall sentence the defendant in accordance with the recommendation of the jury. If the jury is unable to unanimously

agree on a recommendation, the court shall impose a sentence of life imprisonment without benefit of probation, parole or suspension of sentence.

Added by Acts 1976, No. 694, § 1.

Art. 905.9. Review on appeal

The Supreme Court of Louisiana shall review every sentence of death to determine if it is excessive. The court by rules shall establish such procedures as are necessary to satisfy constitutional criteria for review.

Added by Acts 1976, No. 694, § 1.

Supreme Court Rule 28

Rule 905.9.1. Capital sentence review (applicable to La.C.Cr.P. Art. 905.9)

Section 1. Review Guidelines. Every sentence of death shall be reviewed by this court to determine if it is excessive. In determining whether the sentence is excessive the court shall determine:

(a) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors, and

(b) whether the evidence supports the jury's finding of a statutory aggravating circumstance, and

(c) whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Section 2. Transcript, Record. Whenever the death penalty is imposed a verbatim transcript of the sentencing hearing, along with the record required on appeal, if any, shall be transmitted to the court within the time and in the form, insofar as applicable, for transmitting the record for appeal.

Section 3. Uniform Capital Sentence Report; Sentence Investigation Report.

(a) Whenever the death penalty is imposed, the trial judge shall expeditiously complete and file in the record a Uniform Capital Sentence Report (see Appendix "B"). The trial court may call upon the district attorney, defense counsel and the department of probation and parole of the Department of Corrections to provide any information needed to complete the report.

(b) The trial judge shall cause a sentence investigation to be conducted and the report to be attached to the uniform capital

sentence report. The investigation shall inquire into the defendant's prior delinquent and criminal activity, family situation and background, education, economic and employment status, and any other relevant matters concerning the defendant. This report shall be sealed, except as provided below.

(c) Defense counsel and the district attorney shall be furnished a copy of the completed Capital Sentence Report and of the sentence investigation report, and shall be afforded seven days to file a written opposition to their factual contents. If the opposition shows sufficient grounds, the court shall conduct a contradictory hearing to resolve any substantial factual issues raised by the reports. In all cases, the opposition, if any, shall be attached to the reports.

(d) The preparation and lodging of the record for appeal shall not be delayed pending completion of the Uniform Capital Sentence Report.

Section 4. Sentence Review Memoranda; Form; Time for Filing.

(a) In addition to the briefs required on the appeal of the guilt-determination trial, the district attorney and the defendant shall file sentence review memoranda addressed to the propriety of the sentence. The form shall conform, insofar as applicable, to that required for briefs.

(b) The district attorney shall file the memorandum on behalf of the state within the time provided for the defendant to file his brief on the appeal. The memorandum shall include:

i. a list of each first degree murder case in the district in which sentence was imposed after January 1, 1976. The list shall include the docket number, caption, crime convicted, sentence actually imposed and a synopsis of the facts in the record concerning the crime and the defendant.

ii. a synopsis of the facts in the record concerning the crime and the defendant in the instant case,

iii. any other matter relating to the guidelines in Section 1.

(c) Defense counsel shall file a memorandum on behalf of the defendant within the time for the state to file its brief on the appeal. The memorandum shall address itself to the state's memorandum and any other matter relative to the guidelines in Section 1.

Section 5. Remand for Expansion of the Record. The court may remand the matter for the development of facts relating to whether the sentence is excessive.

Added Nov. 22, 1977, eff. Jan. 1, 1978.

NEW ORLEANS, 70112

FOR IMMEDIATE NEWS RELEASE NEWS RELEASE # 53

FROM: CLERK OF SUPREME COURT OF LOUISIANA

On the 18th day of May, 1981, the following action was taken by the Supreme Court of Louisiana, composed of Chief Justice John A. Dixon, Jr., and Associate Justices Pascal F. Calogero, Jr., Walter F. Marcus, Jr., James L. Dennis, Fred A. Blanche, Jr., Jack Crozier Watson, and Harry T. Lemmon, in the cases listed below:

REHEARING GRANTED:

80-K-2692 State v. Mary Guillory
Two Applications - Granted on State's Application only; Defendant's application denied.
DIXON, C.J., & DENNIS, J., would grant a rehearing on defendant's application.

REHEARINGS DENIED:

80-KA-2137 State v. Ronald Monroe
DENNIS, J., would grant a rehearing as to the sentence.

80-C-2443 Parish National Bank v. C. E. Lane
MARCUS & WATSON, JJ., would grant a rehearing.

64,786 State v. Renee Morris
Two applications.

67,478 State v. Rown Williams
See Per Curiam.
LEMMON, J., concurs.

67,540 Pharis & Pharis v. Mary Elizabeth Rayner
MARCUS & BLANCHE, JJ., would grant a rehearing.

80-C-1953 Floyd W. Lopez v. Blue Cross of La.
MARCUS & BLANCHE, JJ., would grant a rehearing.

80-K-2400 State v. Jerry B. Pittman

80-K-2096 State v. Richard C Valentine
CALOGERO, DENNIS & LEMMON, JJ., would grant a rehearing.

80-K-2609 In the Matter of an Offense Under Investigation,
In Re: Morris Thrift Pharmacy
Two Applications
CALOGERO, J., would grant a rehearing.

80-KA-2344 State v. Ray Matthews Korman

80-KA-2205 State v. Warren S. McGary

80-KA-2346 State v. Martin J. Nicholas and Lindy Roland

80-KA-2142 State v. Doug Russell and Oscar Prock
Applications filed by both defendants

80-K-2546 State v. Amanda Smith

80-KA-2298 State v. Jerry L. Bates and James L. Washington
Applications filed by both defendants.

80-KA-2710 State v. Charles C. Festervand
DIXON, C.J., & DENNIS, J., would grant a rehearing as to sentence.

STATE OF LOUISIANA

VS

RONALD S. MONROE

CRIMINAL DISTRICT COURT

PARISH OF ORLEANS

SECTION "F" - NO. 261-647

WARRANT FOR EXECUTION OF PERSON CONDEMNED

TO: Hon. C. Paul Phelps, Secretary of the Department of Correctic
State of Louisiana, Department of Corrections
Baton Rouge, Louisiana

WHEREAS, it appears from the annexed duly certified copy of the indictment, verdict, including the finding of guilt, jury recommendation, sentence and the judgment of the Supreme Court of Louisiana affirming the sentence of death, and denial of a rehearing by the Supreme Court of Louisiana, that at a session of Section "F," Criminal District Court for the Parish of Orleans, State of Louisiana, RONALD S. MONROE was convicted on the 23rd day of January, 1980, of the crime of First Degree Murder of LENORA E. COLLINS, in violation of La. R. S. 14:30, and that on the 23rd day of January, 1980, the jury unanimously recommended that said defendant be sentenced to death; and that in accordance with the said recommendation of the jury, the undersigned Judge of the sai Court, sentenced the said RONALD S. MONROE to death on February 6th, 1980; and that the said conviction and said sentence of deat has been finally affirmed by the Supreme Court of Louisiana and a rehearing has been denied;

NOW, THEREFORE, in accordance with the provisions of R. S. 15:567, I, OLIVER P. SCHULINGKAMP, Judge of Section "F," Criminal District Court, Parish of Orleans, State of Louisiana, do hereby command you as Secretary of the Department of Corrections to cause the execution of RONALD S. MONROE, the condemned in this case, in the manner provided by law. You shall cause the condemn ed, RONALD S. MONROE, to be put to death on AUGUST 19th, 1981, between the hours of 12 o'clock midnight and 3 o'clock A.M., and you shall follow all of the requirements and requisites of the la in carrying out this execution.

Filed
5-20-81

WARRANT FOR EXECUTION OF RONALD S. MONROE (CONTINUED)

A certified copy of this Death Warrant shall be mailed by the Clerk of Court of the Parish of Orleans to the Governor of the State of Louisiana, return receipt requested, and the return receipt shall be filed in the record of these proceedings upon its return to the said Clerk of Court.

THUS DONE, RENDERED, READ AND SIGNED in the City of New Orleans, Parish of Orleans, State of Louisiana, on this 20th day of May, 1981.

OLIVER P. SCHULINGKAMP, JUDGE
SECTION "F," CRIMINAL DISTRICT COURT

May 20th 1981
A certified True Copy:
Walter J. Hammer
Minute Clerk

Office - Supreme Court, U.S.
FILED
OCT 5 1981
ALEXANDER L. STEVAS
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 81-5044

RONALD MONROE,
Petitioner

VS.

STATE OF LOUISIANA,
Respondent

RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

WILLIAM J. GUSTE, JR.,
ATTORNEY GENERAL OF LOUISIANA

HARRY F. CONNICK,
DISTRICT ATTORNEY OF THE
PARISH OF ORLEANS

JOHN H. CRAFT,
ASSISTANT DISTRICT ATTORNEY
OF THE PARISH OF ORLEANS

619 South White Street
New Orleans, Louisiana 70119
Tele: (504) 822-2414, Ext. 605

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 81-5044

RONALD MONROE,
Petitioner

Vs.

STATE OF LOUISIANA,
Respondent

RESPONSE IN OPPOSITION TO PETITION
FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF LOUISIANA

STATEMENT OF THE CASE

The petitioner, Ronald Monroe, has been convicted of first degree murder, a violation of Louisiana Revised Statute 14:30, and sentenced to death pursuant to Louisiana's capital sentencing procedure as set out in the Louisiana Code of Criminal Procedure, Article 905 et seq.

An earlier trial which also resulted in the death penalty was reversed by the Louisiana Supreme Court on grounds irrelevant to the instant petition.

STATEMENT OF FACTS

Mrs. Lenora Collins and her two children lived in one half of a duplex. Ronald Monroe and his family lived in the other half. Mrs. Collins' mother bought the house and informed the Monroe family that they would have to move out because she wanted to move into the house to be near her daughter and grandchildren. On September 10, 1977, Ronald Monroe broke

into Mrs. Collins' half of the house. Armed with a butcher knife, Monroe exacted his revenge for the eviction by stabbing Mrs. Collins repeatedly. Monroe inflicted three eight inch knife wounds on Mrs. Collins. One of the wounds was afflicted with such force that it completely severed a rib. The victim lost at least two quarts of blood which was splattered all over the house. Mrs. Collins' two children saw their mother brutally assaulted and then were attacked themselves. One of the children managed to escape, the other was stabbed in the back before she was able to lock herself in the bathroom. Hearing her mother call for her, the victim's daughter came out of the bathroom in time to see her mother reach for the telephone only to fall dead. The victim's son, who had run outside, saw Monroe come out of the Collins residence exaulting in his triumph saying "I got her. I got her."

ARGUMENT

I

After finding Ronald Monroe guilty of first degree murder, the jury returned a recommendation that he receive the death penalty. The jury based its recommendation upon a finding that there existed three of the aggravating circumstances listed in Louisiana Code of Criminal Procedure Article 905.4:

> "(a) The offender was engaged in the perpetration or attempted perpetration of aggravated rape, aggravated kidnapping, aggravated burglary, or armed robbery;
>
> "* * * *
>
> "(d) The offender knowingly created a risk of death or great bodily harm to

more than one person;

"* * * *

"(g) The offense was committed in an especially heinous, atrocious or cruel manner."

The Louisiana Supreme Court determined on appeal that the first two aggravating circumstances were properly found by the jury. As to the third, however, the court, relying on its own jurisprudence, found that the third aggravating circumstance was not present. After conceding that the killing was brutal, the court stated:

> "Nonetheless, in order for a murder to be 'especially heinous,' there must exist evidence that there was 'torture or the pitiless infliction of unnecessary pain on the victim.' State v. English, 367 So.2d 815, 823 (La. 1979). . . . While there is some evidence in this case that the offense was heinous and cruel, it was not proved beyond a reasonable doubt that the instant offense was <u>especially</u> heinous." (Emphasis in original).

The Louisiana Supreme Court went on to disregard <u>Stephens v. Zant</u>, 631 F.2d 397 (5th Cir. 1980), and to hold that where two of three aggravating circumstances found by the jury were upheld on appeal, the death penalty need not be reversed. Petitioner maintains that that holding is erroneous.

Petitioner argues that Stephens v. Zant requires that where one aggravating circumstance is erroneously found, the death penalty can not stand. Certiorari having been granted in that case (Zant v. Stephens, No. 81-89), it cannot be stated with certainty what the abiding rule of law emerging from that case will be until this Honorable Court has ruled.

Stephens was convicted of murder and sentenced to death. After his conviction and sentence were affirmed on appeal to the Supreme Court of Georgia, he sought federal habeas corpus relief. The United States District Court for the Middle District of Georgia denied him relief, prompting his appeal to the United States Court of Appeals for the Fifth Circuit.

Among the aggravating circumstances found by the jury in returning the death penalty was "the offense was committed by one having a substantial history of serious assaultive criminal convictions." Subsequent to petitioner's conviction, that aggravating circumstance was ruled to be unconstitutionally vague. Arnold v. State, 236 Ga. 534, 224 S.E.2d 386 (1976).

Relying upon a series of cases commencing with Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532, 85 L.Ed. 1117 (1931), the Fifth Circuit held that because it was impossible to determine whether or not the jury relied upon the unconstitutional aggravating circumstance in returning the death penalty, the penalty could not stand. In Stromberg, a young woman was convicted under a statute parts of which were patently offensive under the First Amendment. Although one of the alternative theories of guilt under that statute was constitutional, this Honorable Court found that because the judge returned a

general verdict which did not indicate which theory of guilt he relied upon, the conviction could not stand.

Similarly, the Fifth Circuit found that because it could not determine the extent to which the jury relied upon the unconstitutional aggravating circumstance, the penalty could not stand.

In the instant case, however, the Louisiana Supreme Court did not find the aggravating circumstance it rejected to be unconstitutional. Instead, the court determined that under the applicable jurisprudence, the facts of the case did not support a factual determination that the crime was committed in an "especially heinous or atrocious manner."[1/]

The Louisiana Supreme Court, torn between the conflicting opinions of the highest court of the State of Georgia and an intermediate federal court, chose to adopt as persuasive the opinion of the Georgia Supreme Court and reject Stephens v. Zant. Most importantly, the Louisiana Court noted no extraneous facts were brought before the jury determining Stephens' sentence even though the offensive aggravating circumstance was considered:

> ". . . under George law, in capital cases, a defendant's criminal record is before the jury for its consideration regardless of whether it arguably evidences a 'substantial history of

1/ In recognition of the inevitable confusion brought about the macabre and lamentable legal niceties distinguishing especially heinous murders from those of only ordinary heinousness, the Louisiana Supreme Court has recently fashioned a rule requiring instructions to the jury to the effect that torture or the pitiless infliction of unnecessary pain upon the victim is necessary for a finding of the existence of the aggravating circumstance. State v. Sonnier, No. 80-K-1846, (La. June 22, 1981).

serious assaultive criminal convictions.' See Ga. CodeAnn. §27-2503 (a). Thus, the jury would have been apprised of, and could have legally considered, Stephens' criminal record in any event."

In the instant case, where the aggravating circumstance discarded on appeal was drawn solely from the facts of the case, it is clear that no external or arbitrary elements were brought into the jury's consideration. The jury was well aware of the brutal and callous manner by which petitioner murdered Mrs. Collins and had every right to consider the facts of the case when determining whether or not to be merciful.[2/]

Stromberg and its progeny, Bachellar v. Maryland, 397 U.S. 564, 90 S.Ct. 1312, 25 L.Ed.2d 570 (1970); Street v. New York, 394 U.S. 576, 89 S.Ct. 1354, L.Ed.2d 572 (1969); Yates v. United States, 354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed.2d 1356 (1957); relied on heavily by the Fifth Circuit in Stephens v. Zant, show a marked similarity in that they all stress two factors:

2/ Of course, it has been the position of the State of Louisiana throughout the various stages of this litigation that even under the Louisiana court's unnecessarily restrictive rule in State v. English, that this crime was especially heinous, atrocious and cruel. It is regrettable that the Louisiana Supreme Court's overreaction to dicta in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) and Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1968), has resulted in a rule of law that says that only the most unspeakable horrors fall into the category of especially atrocious, etc.

That the Louisiana Supreme Court is way off the mark is made all the more clear by this Honorable Court's comments in a footnote in Proffitt v. Florida, the font of the Louisiana court's purported revelation about conscienceless or pitiless infliction of pain. In that footnote (Fn. 12, 96 S.Ct. at 2968), this Honorable Court approved findings of the existence of a substantially identical aggravating circumstance where the crime was positively genteel in comparison to Ronald Monroe's totally merciless slaughter of Mrs. Collins.

1) At least one alternate theory of guilt under a statute was patently unconstitutional; and

2) The verdict was of the type that it cannot be determined upon what theory of guilt the verdict was based.

The distinctions between the Stromberg strain and cases involving aggravating circumstances, and this case in particular, are clear.

The Louisiana Supreme Court did not reject the heinousness aggravating circumstance because of any constitutional infirmity. It found that it was inapplicable because of technical niceties of the Court's own construction. There also is no difficulty in determining what the death penalty recommendation was based upon in that the jury returned a written holding indicating which aggravating circumstance it had found. It is quite clear that the jury knew exactly what it was doing in recommending the death penalty and was not misled by an a aberrant aggravating circumstance.

II

Petitioner maintains that his conviction should have been reversed by the Louisiana Supreme Court on the grounds that the trial court erred in denying a mistrial and sentencing him to life imprisonment when the jury returned to declare that it had not been able to reach a decision.

After only forty-five minutes, a very short period of deliberation, the jury returned to the courtroom. The fore-

man announced that there was some difficulty in reaching a decision. Although the foreman characterized the problem as a "hung jury," the judge determined that there had not been sufficient time spent in deliberation, charged the jury as to the consequences of a hung jury and sent them back to the jury room. Petitioner argues that by informing the jurors of the effect of deadlock and allowing further deliberations, the trial judge implied that he wanted the jurors to impose the death penalty.

As the record clearly indicates, this allegation is meritless. As the exchange between the jury foreman and the judge demonstrates, the judge did not more than exercise his discretion in determining that the claim that the jury was hung was more the result of incomplete deliberation than true impasse. The judge's comment in no way impressed upon the jury the need to return any particular verdict:

> BY THE FOREMAN:
>
> Your Honor, we have a hung jury, we cannot make a determination about the sentence in this case.
>
> BY THE COURT:
>
> Well, I was given to understand by the Sheriff that you wanted more instructions. Additional instructions, is that correct or not?
>
> BY THE FOREMAN:
>
> He asked me to come down and explain that to you.
>
> BY THE COURT:
>
> That is what he explained to me. But what I am asking you--you told me you can't agree.

BY THE FOREMAN:

Correct sir.

BY THE COURT:

Okay. And he told me that. Now we are finished with that. Now, I am asking you is it correct as the Sheriff indicated to me, that in addition to not agreeing you now require more instructions.

BY THE FOREMAN:

Correct sir.

BY THE COURT:

On what?

BY THE FOREMAN:

On the procedure to follow in the event we cannot all unanimously on one or the other decision. We cannot agree on death or life imprisonment.

BY MR. LAWRENCE:

Your Honor, I think the law is quite clear on that point. I think that the jury has indicated they are hung and that's it.

BY THE COURT:

Well, Mr. Lawrence, you forget one important point. That the court and only the court makes the determination as to whether a sufficient time has elapsed to understand if they are hung or not.

BY MR. LAWRENCE:

I don't believe that's the case your Honor. I believe that the law says if they cannot decide the . . .

BY THE COURT:

After a reasonable time. Now, the words, "after a reasonable time" are not expressly put in this statute, but it is a matter of common sense it seems to me, that it is implicit in the concept. Let us take a ridiculous example for purpose of illustration, suppose they came back after being up there five minutes and say, "We can't agree".

BY MR. LAWRENCE:

Then the court is suppose to follow what the Code says.

BY THE COURT:

Alright, that's your version. I entirely disagree because I think in deference to you it is ludicrous. Do I understand that you want--you said you wanted further instructions. Now let me get my mind back on this trend of thought, since there was a necessary interruption. And instead of my trying to paraphrase it, would you please tell me again, specifically, what seems to be the problem, or what instructions further, on what point, do you want?

BY THE FOREMAN:

We are divided right now in our decision making. From the evidence of discussion upstairs, I don't believe from the discussion we had that we are going to be able to get off dead center, because each one of us feel strongly about our particular posture right now. With that in mind, I felt like I had to ask you how we should approach the problem.

BY THE COURT:

Well, the law is this. As I understand it, and for present purposes, I am the law. As I understand it to render a verdict of death penalty, the penalty of death, the jury must agree unanimously. To render a sentence recommendation of life imprisonment, the jury must likewise agree unanimously. However, if the jury cannot agree, then the court must impose a sentence of life imprisonment without the benefit of probation, parole or suspension of sentence. Is that clear to all of you? (Jurors responded affirmatively.) However, I think, contrary to defense counsel, that implicit, in herent, necessarily so, in the interpretation of that law, since it is not spelled out in that statute, that the court must be convinced in its own mind, that the jury has had a sufficient time to conjugate [sic] on this serious matter. And my judgment at the moment is, in view of the fact that you've been out relatively a short time, that I don't think that you have had at this juncture sufficient time to give it a representative trial, representative run. Along with that I see the sandwiches are here, the lunch, so suppose you all go back, have your eats, and discuss it further and then if you are of the same mind, you can inform me, or if it is the other way, you can inform me whatever the case--whatever the situation is. And I don't want of necessity to set any arbitrary time limits now, that gets to be a ticklish situa-

tion, because it could be construed one way or the other. So a reasonable time is as much as I am going to say. The court will be in recess. (Trial Transcript, pp. 263-266).

It is abundantly clear that the trial judge cautiously and judiciously exercised his discretion in rejecting the foreman's premature and inaccurate representation that the jury was hung.

This allegation is meritless.

CONCLUSION

I

The Louisiana Supreme Court properly rejected the incorrect holding of the Fifth Circuit in Stephens v. Zant in favor of the more accurate opinion of the Georgia Supreme Court in holding that appellate rejection of one of three aggravating circumstances does not mandate reversal of the death penalty.

II

Petitioner incorrectly characterizes the trial court's actions when the jury informed the court that it was deadlocked quite soon after deliberations began. The record clearly indicates that the judge did not improperly influence the jury's deliberations.

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CERTIFICATE

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